

(21,745.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 84.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER
WHITTREN, AND ANDREW EADIE, PETITIONERS,

vs.

JOSEPH HAMMER, OTTO HALLA, AND B. SCHWARZ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print
Caption	<i>a</i>	1
Order enlarging time to file record, &c.	1	1
Names and addresses of attorneys.....	2	2
Transcript from the district court of Alaska, second division	2	2
Complaint.....	3	2
Summons.....	5	3
Marshal's return.....	6	4
Demurrer of Waskey <i>et al.</i> to complaint.....	7	4
Demurrer of Whittren <i>et al.</i> to complaint.....	8	5
Order overruling demurrers, &c.....	9	5
Answer of Whittren <i>et al.</i>	10	6
Order granting leave to add J. J. Chambers as a party defend- ant.....	12	7
Answer of F. H. Waskey <i>et al.</i>	13	8
Exhibit A—Lease, Eadie & Whittren to Waskey, June 11, 1906	18	10
Exhibit B—Agreement between Eadie, Whittren, and Waskey, June 20, 1906.....	23	13

	Original.	Print
Reply to answer of Waskey <i>et al.</i>	28	15
Reply to answer of Whittren <i>et al.</i>	31	17
Verdict.....	36	19
Motion for new trial.....	37	20
Order overruling motion for new trial, &c.....	39	21
Judgment.....	40	22
Bill of exceptions.....	43	23
Testimony of B. Schwarz.....	44	24
Exhibit 2—Notice of location.....	46	25
1—Map.....	49	26
X—Map.....	50	26
Testimony of Otto Halla.....	54	28
Testimony of J. Potter Whittren.....	58	30
Exhibit 5—Location Notice No. 13772.....	66	34
D—Map.....	70	35
E—Map.....	71	35
F—Field notes, &c.....	79	39
G—Field notes, &c.....	80	39
Testimony of Charles D. Taft.....	81	40
F. M. Lange.....	85	41
Arthur Gibson.....	85	42
J. J. Chambers.....	86	42
J. Potter Whittren (recalled).....	86	42
Andrew Eadie.....	87	43
Exhibit H—Deed, Whittren to Eadie, Sept. 24, 1905..	88	43
Stipulation admitting that defendant was a lessee.....	91	45
Motion for verdict for plaintiffs.....	91	45
Decision on motion for verdict for plaintiffs.....	93	46
Instructions of court to jury.....	95	47
Exceptions to instructions.....	97	48
Prayer for settlement of bill of exceptions.....	98	48
Judge's certificate to bill of exceptions.....	98	49
Assignment of errors.....	100	49
Petition for writ of error.....	103	51
Bond on writ of error.....	105	52
Writ of error (copy).....	108	54
Clerk's certificate.....	110	55
Writ of error (original).....	112	56
Citation (original).....	114	57
Clerk's certificate to printed record.....	117	58
Caption to proceedings in United States circuit court of appeals....	118	59
Order of submission.....	119	59
Opinion.....	120	60
Judgment.....	133	66
Order denying petition for rehearing.....	134	67
Clerk's certificate.....	135	67
Writ of certiorari.....	136	68
Stipulation as to return to writ of certiorari.....	139	69
Return to writ of certiorari.....	142	70

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No. 1609.

United States Circuit Court of Appeals for the Ninth Circuit.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN
and ANDREW EADIE, Plaintiffs in Error,

vs.

JOSEPH HAMMER, OTTO HALLA and B. SCHWARTZ, Defendants
in Error.Upon Writ of Error to the United States District Court for the
District of Alaska, Second Division.

TRANSCRIPT OF RECORD.

1 [*Order Enlarging Time to File Record Thereof and to
Docket Cause.*]

In the United States Circuit Court of Appeals for the Ninth Circuit.

F. H. WASKEY, J. CRABTREE, J. POTTER WHITTREN and ANDREW
EADIE, Plaintiffs in Error,

vs.

JOS. HAMMER, B. SCHWARTZ, and OTTO HALLA, Defendants
in Error.

Good cause appearing therefor, it is hereby ordered that the time for the plaintiffs in error to file the Transcript of the Record in the above-entitled cause and docket the same in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, enlarged ninety (90) days after the return day of the citation.

Done at Nome, this 1st day of February, 1908, by the undersigned Judge, who signed the Citation on the Writ of Error issued herein.

ALFRED S. MOORE,

Judge District Court, District of Alaska, Second Division.

[Endorsed:] C. C. A. No. 1609. In the District Court for the District of Alaska, Second Division. F. H. Waskey, et al., Plaintiff, vs. Jos. Hammer, et al., Defendant. No. 1609. United States Circuit Court of Appeals for the Ninth Circuit. Order Enlarging Time to File Transcript of Record. Filed Apr. 6, 1908. F. D. Monckton, Clerk. Re-filed May 19, 1908. F. D. Monckton, Clerk. Ira D. Orton, Attorney for Plaintiffs in Error

[Names and Addresses of] Attorneys of Record.

T. M. Reed, Nome, Alaska,
 Elwood Bruner, Nome, Alaska,
 J. Allison Bruner, Nome, Alaska,

Attorneys for Plaintiffs.

F. E. Fuller, Nome, Alaska,
 O. D. Cochran, Nome, Alaska,
 Ira D. Orton, Nome, Alaska,
 C. D. Murane, Nome, Alaska,
 W. A. Gilmore,

Attorneys for Defendants.

In the U. S. District Court, District of Alaska, Second Division.

JOSEPH HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,
 vs.

FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN and
 ANDREW EADIE, Defendants.

3

Complaint.

The plaintiffs complain of defendants, and for a cause of action allege:

1. That ever since the 1st day of January, 1904, the plaintiffs have been, and they now are, the owners in fee and entitled to the possession, by virtue of a valid mining location known and described as the Golden Bull Placer Mining Claim, of the following described premises, lying and being in the Cape Nome Mining and Recording District, in the District of Alaska, to wit: Commencing at the northeast corner of the Golden Bull Placer Mining Claim; thence running by magnetic courses S. 27 deg. 15' E. 630 feet; thence S. 45 deg. W. 695 feet; thence N. 27 deg. 30' W. 495 feet; thence N. 35 deg. 10' E. 747 feet to the place of beginning, containing about 8.55 acres.

2. That on the — day of June, 1906, the defendants forcibly and unlawfully ousted and ejected the said plaintiffs from the premises above described, and ever since that time have withheld, and are now withholding, the possession thereof from the plaintiffs, to their damage in the sum of Seventy-Five Thousand Dollars (\$75,000.00).

Wherefore the plaintiffs pray for Judgment as follows: That they be decreed to be the owners in fee, and entitled to the possession

of the premises aforesaid; that they do have and recover from
 4 the defendants, and each of them, damages in the sum of

Seventy-Five Thousand Dollars; and for their costs and disbursements herein.

T. M. REED,
 Attorney for the Plaintiffs.

UNITED STATES OF AMERICA,
District of Alaska, ss:

Otto Halla, being first duly sworn, on oath deposes and says that he is one of the plaintiffs in the above-entitled action, that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

OTTO HALLA.

Subscribed and sworn to before me this 13 day of October, A. D. 1906.

T. M. REED,

[NOTARIAL SEAL.] *Notary Public, District of Alaska.*

[Endorsed:] 1636. No. — In the District Court for the District of Alaska, Second Division. Joseph Hammer, B. Schwartz and Otto Halla, Plaintiffs, vs. Frank H. Waskey, J. Crabtree, J. Potter Whittren and Andrew Eadie, Defendant. Complaint. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Oct. 15, 1906. Jno. H. Dunn, Clerk. By — — —, Deputy. T. M. Reed, Attorney for Plaintiff, Nome, Alaska. Filed — 190— — — —, Clerk. By — — —, Deputy. L.

5 In the U. S. District Court in and for the District of Alaska,
 Second Judicial Division.

JOSEPH HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,
 vs.

FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and
 ANDREW EADIE, Defendants.

Summons.

The President of the United States of America, to F. H. Waskey, J. Crabtree J. Potter Whittren, and Andrew Eadie, Defendants in the above-named Cause, Greeting:

You are hereby summoned and required to appear and answer the complaint of the plaintiffs now on file in the office of the Clerk of the above-entitled court, at the city of Nome, in the District of Alaska, within 30 days of the service of this summons upon you, or judgment for want thereof will be taken against you; and you are hereby further notified that if you fail to answer the above complaint, the plaintiffs will apply to the court for the relief demanded therein.

Witness the Honorable Alfred S. Moore, Judge of the above-named Court, and the seal of the said Court hereto attached, this 15th day of October, in the year of our Lord one thousand nine
 6 hundred and six, and of the Independence of the United States the one hundred thirty-first.

JNO. H. DUNN,

[COURT SEAL.] *Clerk of the District Court, District
 of Alaska, Second Division.*

By ANGUS McBRIDE,
Deputy Clerk.

UNITED STATES OF AMERICA,
District of Alaska, Second Division, ss:

I hereby certify that I received the annexed summons on the 15th day of October, 1906, and thereafter on the same date I served the same at Nome, Alaska, upon J. Crabtree, J. Potter Whittren and Andrew Eadie, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein; after due and diligent search I was unable to find Frank H. Waskey within this district.

Returned this 15th day of October, 1906.

THOMAS CADER POWELL,

United States Marshal.

By JAS. J. STOKES, *Deputy.*

Marshal's Costs: 3 Services, \$18.00.

[Endorsed:] No. 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer, B. Schwartz and Otto Halla, Plaintiffs, vs. Frank H. Waskey, J. Crabtree, J. Potter Whittren and Andrew Eadie, Defendants. Summons. Filed in
 7 the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Oct. 16, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. T. M. Reed, Attorney for ———, Nome, Alaska. Filed — 190— ———, Clerk. By ———, Deputy. L.

In the United States District Court in and for the District of Alaska,
 Second Division.

JOSEPH HAMMER et al., Plaintiffs,

vs.

F. H. WASKEY et al., Defendants.

Demurrer [of F. H. Waskey et al. to Complaint].

Comes now the defendants F. H. Waskey and J. M. Crabtree, in the above-entitled action, and file this their demurrer to the complaint of the plaintiffs therein filed on the ground and for the reason that said complaint does not state facts sufficient to constitute a cause of action against them or either of them.

Dated at Nome, Alaska, November 14th, 1906.

ALBERT FINK,

IRA D. ORTON,

Attorneys for Demurring Defendants.

[Endorsed:] #1636. In the United States District Court for the District of Alaska, Second Division. Jos. Hammer et al., Plaintiff, vs. F. H. Waskey et al., Defendant. Demurrer. Filed
 8 in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 14, 1906. Jno. H. Dunn, Clerk. By ———, Deputy. D. Albert Fink, Ira D. Orton, Attorneys for Def'ts.

In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,
 vs.
 FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and
 ANDREW EADIE, Defendants.

Demurrer [of J. Potter Whittren et al. to Complaint].

Comes now the defendants, J. Potter Whittren and Andrew Eadie and demur to the complaint of the plaintiffs filed herein and for cause of demurrer allege, that said complaint does not state facts sufficient to constitute a cause of action.

F. E. FULLER,
 O. D. COCHRAN.

Attorneys for Defendants Whittren and Eadie.

[Endorsed:] No. 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs. Frank H. Waskey et al., Defendant. Demurrer. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 15, 1906. Jno. H. Dunn, Clerk. By —, Deputy. F. E. Fuller & O. D. Cochran, Attys. for Defendants.

[Order Overruling Demurrers, etc.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special September, 1906, Term, Begun and held at the Town of Nome, in said District and Division, Sept. 24, 1906.

SATURDAY, Jan. 12, 1907—at 10 a. m.

Court convened pursuant to adjournment.

Present:

Hon. Alfred S. Moore, Judge.
 John H. Dunn, Clerk.
 Angus McBride, Deputy Clerk.
 Geo. B. Grigsby, Acting U. S. Attorney.
 Thos. C. Powell, U. S. Marshal.

Now upon the convening of Court the following proceedings were had:

#1636.

HAMMER et al.

vs.

WASKEY et al.

Demurrer of Waskey et al. to complaint and also the demurrer of Whittren et al. to complaint were submitted by counsel without argument and overruled, fifteen days being allowed to each defendant to answer.

10 In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiff,

vs.

FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and
ANDREW EADIE, Defendants.

Answer [of J. Potter Whittren et al.]

Comes now the defendants, J. Potter Whittren and Andrew Eadie, and answering the complaint of the plaintiff filed herein, admit, deny and allege:

1.

Deny each and every allegation in said complaint contained, except that defendants are in the possession of the premises described in said complaint, as hereinafter alleged.

And for a further second separate answer and defense to said complaint, answering defendants allege:

1.

That during all the times mentioned in said complaint, the answering defendants were and now are the owners in fee, in the possession and entitled to the possession of the premises described in plaintiff's complaint.

2.

That the defendants, Waskey and Crabtree, are the lessee of said premises from the answering defendants herein.

11 Wherefore, having fully answered the complaint of plaintiffs the defendants, Whittren and Eadie, demand judgment against the plaintiffs that they are the owners in fee and entitled to the possession of the premises described in plaintiffs' complaint and for the costs and disbursements herein incurred.

F. E. FULLER,
O. D. COCHRAN,

.. Attorneys for Defendants Whittren and Eadie.

UNITED STATES OF AMERICA,
District of Alaska, ss:

Andrew Eadie, being first duly sworn, deposes and says: That he is one of the answering defendants named in the foregoing answer; that he has read the same, knows the contents thereof and that the same is true as he verily believes.

ANDREW EADIE.

Subscribed and sworn to before me, this 8th day of February, 1907.

[NOTARIAL SEAL.]

O. D. COCHRAN,
Notary Public in and for the District of Alaska.

[Endorsed:] No. 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiffs, vs. Frank H. Waskey et al., Defendants. Answer. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Feb. 9, 1907. Jno. H. Dunn, Clerk. By —, Deputy. L. F. E. Fuller, O. D. Cochran, Atty. for Defendants Whittren and Eadie.

12 [Order Granting Leave to Add J. J. Chambers as a Party Defendant, etc.]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special January, 1907, Term, Begun and Held at the Town of Nome, in said District and Division, Jan. 14, 1907.

SATURDAY, Feb. 16, 1907—at 10 a. m.

Court convened pursuant to adjournment.

Present:

Hon. Alfred S. Moore, Judge.

John H. Dunn, Clerk.

Angus McBride, Deputy Clerk.

Geo. B. Grigsby, Acting U. S. Attorney.

Thos. C. Powell, U. S. Marshal.

Now upon the convening of Court the following proceedings were had:

#1636.

HAMMER et al.

vs.

WASKEY et al.

On motion of Elwood Bruner, plaintiffs were granted leave to add J. J. Chambers as a party defendant, the defendant to be served with a copy of the complaint as amended, and the pleadings on file to be amended by interlineation.

13

[Answer of F. H. Waskey et al.]

In the United States District Court in and for the District of Alaska,
Second Division.

JOSEPH HAMMER et al., Plaintiffs,

vs.

F. H. WASKEY et al., Defendants.

Come now F. H. Waskey and J. Crabtree, defendants in the above-entitled action, and for answer to plaintiffs' complaint, allege and deny as follows.

I.

Deny each and every allegation contained in plaintiffs' complaint.

II.

And for a further, separate and affirmative answer thereto, defendants allege:

First. That the defendants J. Potter Whittren and Andrew Eadie are and were at the time of the commencement of this action the owners in fee of the land and premises described in plaintiffs' complaint under and by virtue of a valid location thereof as a placer mining claim made by said J. Potter Whittren on the 1st day of January, 1902. That on the 1st day of January, 1902, the lands and premises described in plaintiffs' complaint, together with certain ground adjacent thereto, were vacant, unoccupied and unappropriated mineral land belonging to the Government of the

14 United States, and on said date the said J. Potter Whittren entered thereon and located the same as a placer mining claim under the laws of the United States, then and there doing and performing each and every act thereon required by law to make and perfect a valid mining location of Government placer mineral land. That said claim, as thus located by said Whittren, was by him named and called the "Bon Voyage," and contained at the time of the original location thereof by the said Whittren an area slightly in excess of twenty acres, but thereafter on November 11, 1903, the said Whittren made an accurate survey of said "Bon Voyage" claim, and slightly changed the position of three of his corner stakes by drawing them in, and as thus changed the said location contained no more than 20 acres.

Second. That upon the location of said "Bon Voyage" claim the said Whittren entered into the possession of the same, and thereafter until the 24th day of September, 1905, the said Whittren continued to be the sole owner in fee, in possession and entitled to the possession of said "Bon Voyage" claim; that on said 24th day of September, 1905, the said J. Potter Whittren, for a valuable consideration, by deed, in writing, sold and conveyed to the defendant Eadie an undivided one-half interest in said "Bon Voyage" claim, and since said last-mentioned date the said Whittren and the said Eadie have

been, and they now are the sole owners of said claim as tenants in common.

15 Third. That on the 11th day of June, 1906, the said Whittren and the said Eadie were so the owners of said claim as tenants in common, and were then and there in the sole quiet and exclusive possession of the same, and on said date the said Whittren and Eadie did by an instrument in writing lease, let and demise a portion of said claim to the defendant Waskey for the term to commence at the execution of said lease and ending on the 1st day of June, 1908; that the portion of said claim, so leased, demised and let to said defendant Waskey is bounded and described as follows:

All the following-described lands and premises, situate in Cape Nome Mining and Recording District, District of Alaska, to wit: Commencing at the southwest corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1,320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1,320 feet to the southerly boundary line of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the said Bon Voyage Placer Mining Claim, the location notice whereof is of record in the office of the Recorder of said Cape Nome Recording District, in Book 99, at page 296, of the Records of said District.

That immediately upon the execution of said lease the defendant Waskey entered upon said portion of said claim and
16 commenced to mine and prospect the same for gold in accordance with the terms of said lease and is still so engaged; that the defendant Waskey has at all times kept and performed, and is now keeping and performing all the terms of said lease on his part to be kept and performed; that a true copy of said lease is hereunto annexed, marked Exhibit "A," and made a part of this answer.

Fourth. These defendants further allege that afterwards, to wit, on the 20th day of June, 1906, the said Whittren and the said Eadie were so the owners of said claim as tenants in common and were then and there, together with the defendant Waskey as lessee of the portion thereof hereinbefore described, in the sole, quiet and exclusive possession of the said claim, and on the said 20th day of June, 1906, the said Whittren, Eadie and the defendant Waskey made and entered into a certain lease and contract of the remaining portion of said mine for the term commencing on said 20th day of June, 1906, and ending on the 20th day of June, 1908; that the remaining portion of said mine described in said lease and contract last hereinabove referred to is described as follows:

The easterly 440 feet of said mining claim, being all of said claim not heretofore leased by the said Eadie and the said Whittren to the said Waskey.

That immediately upon the execution of said contract and lease, the defendants Eadie and Waskey entered upon said portion of

17 said claim described therein and commenced to mine and prospect the same for gold in accordance with the terms of said lease and they are still so engaged; that the defendants Waskey and Eadie have at all times kept and performed and are now keeping and performing all the terms of said contract and lease on their part to be kept and performed. That a true copy of said contract and lease is hereto annexed, marked Exhibit "B," and made a part of this answer.

Fifth. The defendants further allege that they have hereinbefore set forth the nature and duration of their estate in the real property described in plaintiffs' complaint, and of their license and right to the possession thereof, and further allege that they are in the possession of said property under and by virtue and pursuant to the two leases and contracts, Exhibits "A" and "B," hereinbefore mentioned.

Sixth. That said "Bon Voyage" claim as located by said J. Potter Whittren on the 1st day of January, 1902, and as surveyed and marked by him on the 11th day of November, 1903, contained within its exterior boundaries the whole of the premises described in plaintiffs' complaint, alleged therein to be the property of the plaintiffs.

Wherefore, having fully answered, these defendants pray to go hence dismissed with judgment for their costs.

ALBERT FINK AND
IRA D. ORTON,

*Attorneys for Defendants, Frank H. Waskey
and J. Crabtree.*

18 UNITED STATES OF AMERICA,
District of Alaska, ss:

J. M. Crabtree, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the above and foregoing answer to plaintiffs' complaint and knows the contents thereof, and believes the same to be true.

J. M. CRABTREE.

Subscribed and sworn to before me, this 20th day of February, 1907.

[NOTARIAL SEAL.]

IDA G. CHAQUETTE,
*Notary Public in and for the District of Alaska,
Residing at Nome.*

EXHIBIT "A" [TO ANSWER OF F. H. WASKEY ET AL.].

#36729.

This indenture, made this eleventh day of June, in the year nineteen hundred and six, between Andrew Eadie and J. Potter Whittren, both of Nome, Alaska, lessors, and F. H. Waskey, of the same place, lessee, witnesseth:

That the said lessors, for and in consideration of the rents, royalties, covenants, and agreements hereinafter reserved and contained and by the said lessee to be paid, kept and performed, do hereby lease, demise, and let unto the said lessee all the following-

19 described lands and premises, situate in Cape Nome Mining and Recording District, District of Alaska, to wit: Commencing at the southwest corner stake of the Bon Voyage Placer Mining Claim; thence northerly along the westerly boundary line of said mining claim 1320 feet to the northwest corner thereof; thence easterly along the northerly boundary line of said mining claim 220 feet; thence southerly 1320 feet to the southerly boundary line of said mining claim; thence westerly 220 feet to the point and place of beginning; being a part of the Bon Voyage Placer Mining Claim, the location notice whereof is of record in the office of the recorder of said Cape Nome Recording District, in book 99, at page 296, of the records of the said district.

To have and to hold all and singular the said demised premises, together with the appurtenances, unto the said lessee for the term commencing on the date hereof and expiring at noon on the first day of June, nineteen hundred and eight, unless sooner forfeited or determined through the violation by the said lessee of any covenant or agreement hereinafter contained and by him to be kept and performed.

And in consideration of such demise and lease the said lessee does covenant and agree with the said lessors as follows, to wit:

1. To enter upon the said premises within five days from the date hereof, and thereafter to prospect, work, and mine the same in good and miner-like manner, so as to take out the greatest possible amount of gold and gold-dust therefrom, with
20 due regard to the continued future working of the said mining claim and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously during the term of this lease; cessation of labor for a period of ten days to be deemed a violation of this agreement.

2. To properly timber all shafts and to keep all shafts and tunnels, drifts and stopes clear and in good and safe condition.

3. To allow the said lessors, and their agent or agents, at all times, to enter upon and into all parts of the said premises, for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort.

4. To give to the said lessors, at Nome, Alaska, at least ten hours' notice of each and every cleanup, and to make no cleanup without giving such notice.

5. To make and file for record an affidavit of the performance of the required annual labor upon the said mining claim, during each calendar year of the term of this lease.

6. To pay to the said lessors, as royalty, thirty-five per centum (35%) of all gold, gold-dust, and other precious minerals and metals mined or extracted from the said premises during the term of this lease and to pay and deliver to the said lessors such royalty out of, and immediately after, each and every cleanup.

21 7. To allow no person or persons not in privity with the said parties hereto to take or hold possession of the said premises, or any part thereof, under any pretense whatever, during the said term.

8. Not to assign this lease or any interest herein, and not to sublet the said premises, or any part thereof, without the written consent of the said lessors.

9. To quit and deliver up to the said lessors the possession of the said premises, X.....X, in good order and condition for continued future mining, without demand or further notice, on said first day of June, 1906, or at any time previous upon demand for forfeiture.

It is expressly agreed that, upon the violation by the said lessee of any covenant or agreement herein contained, this lease and the term hereof, shall, at the option of the lessors, become forfeited and determined, and the said lessors may at once enter into the possession of the said premises and remove any and all persons found thereon.

Each and every part and covenant hereof shall extend to and be binding upon the heirs, executors, administrators, and assigns of the lessors, and, at the option of the lessors, the executors, administrators, and assigns of the said lessee.

22 In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

ANDREW EADIE.	[SEAL.]
J. POTTER WHITTREN.	[SEAL.]
F. H. WASKEY.	[SEAL.]

Done in triplicate.

Signed, sealed and delivered in the presence of—

F. E. FULLER.
A. G. BLAKE.

DISTRICT OF ALASKA,

Cape Nome Precinct, ss:

This is to certify, that on this 11th day of June, A. D. 1906, before me, the undersigned, a Notary Public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial seal this 11th day of June, A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,
Notary Public for Alaska.

Filed for record Aug. 22, 1906, 2:20 P. M. request of F. H. Waskey. F. E. Fuller, Recorder. — — —, Deputy.
(Vol. 164, page 133.)

23 UNITED STATES OF AMERICA,
District of Alaska, Precinct of Cape Nome, ss:

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 36729, the same being Agreement between Andrew Eadie, and J. Potter Whittren, lessors, and F. H. Waskey, lessee, as the same appears of record in Volume 164, at page 133 thereof, of the records of my office.

Witness my hand and the seal of the said office this 12th day of October, 1906.

[SEAL.]

F. E. FULLER,
Recorder.
By F. R. COWDEN,
Deputy.

EXHIBIT "B" [TO ANSWER OF F. H. WASKEY et al.].

#36869.

Agreement.

This agreement, made this 20th day of June, in the year nineteen hundred and six, by and between Andrew Eadie, J. Potter Whittren, and F. H. Waskey, all of Nome, Alaska, Witnesseth:

24 Whereas, the said Eadie and Whittren are the owners of the Bon Voyage Placer Mining Claim, situate in Cape Nome Mining District, Alaska, the location notice whereof is of record in the office of the Recorder of the Cape Nome Recording District, in book 99, at page 296, of the Records of said District;

And whereas, the said Eadie and Waskey desire to work and mine the easterly 440 feet of said mining claim, being all of the said claim not heretofore leased by the said Eadie and Whittren to the said Waskey:

Now, therefore, in consideration of the premises and of the sum of One (\$1.00) Dollar, by the said parties paid, each to the other, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter contained, it is agreed as follows:

The said Eadie and Waskey agree to enter upon the said premises within one days from the date hereof, and thereafter to prospect, work and mine the same in good and minerlike manner so as to take out the greatest amount of gold and gold-dust therefrom, with due regard to the continued future working of the said premises and the preservation of the same as a workable mine, and so to prospect, work and mine the said premises steadily and continuously for the full term of two (2) years from the date hereof, or until said premises shall have been thoroughly and completely mined and worked out; cessation of labor for a period of ten (10) days to be deemed a violation of this agreement,

To properly timber all shafts and to keep all shafts, tunnels, drifts and stopes clear and in good and safe condition;

25 To allow the said Whittren or his agent at all times to enter upon and into all parts of the said premises for purposes of inspection, and to be present and to assist at all cleanups, the retorting of the amalgam, and the weighing of the retort, and to give said Whittren or his agent due notice of each and every cleanup.

It is agreed that of all the gold, gold-dust and other precious minerals and metals mined or extracted from the said premises by the said Eadie and Waskey, under this agreement, one-eighth ($\frac{1}{8}$) part shall be paid and delivered to said Whittren immediately after each and every cleanup, and one-eighth ($\frac{1}{8}$) part to the said Eadie, and the remainder shall be retained by, and equally divided between, the said Waskey and Eadie, after paying from such remainder all costs and expenses of mining and operating under this agreement; the expenses of first locating pay, however, to be borne solely by said Waskey.

In witness whereof, the said parties have hereunto set their hands and seals in triplicate, the day and year first above written.

J. POTTER WHITTREN. [SEAL.]

ANDREW EADIE. [SEAL.]

F. H. WASKEY. [SEAL.]

Signed, sealed and delivered in the presence of—

P. D. OVERFIELD.

26 DISTRICT OF ALASKA,
Cape Nome Precinct, ss:

This is to certify that on this 30th day of August, A. D. 1906, before me, the undersigned, a notary public in and for the District aforesaid, duly commissioned and qualified, personally came Andrew Eadie, J. Potter Whittren and F. H. Waskey, to me known and known to be the same persons described in and whose names are subscribed to the within instrument, and acknowledged that they executed the same freely and voluntarily.

Witness my hand and notarial seal this 30th day of August, A. D. 1906.

[NOTARIAL SEAL.]

F. E. FULLER,
Notary Public for Alaska.

Filed for record Aug. 30, 1906, 2:50 P. M.
Request of F. H. Waskey.

F. E. FULLER,
Recorder.

— — —, *Deputy.*

(Vol. 164, page 138.)

UNITED STATES OF AMERICA,

District of Alaska, Precinct of Cape Nome, ss:

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full, and complete copy of Instrument numbered 36869, the same being agreement between Andrew Eadie, J. Potter Whittren and F. H. Waskey, as the same appears of record in volume 164, at page 138 thereof, of the records of my office.

Witness my hand and seal of the said office this 12th day of October, 1906.

[SEAL.]

F. E. FULLER,

Recorder.

By F. R. COWDEN,

Deputy.

UNITED STATES OF AMERICA,

District of Alaska, ss:

Due service of the within answer of F. H. Waskey and J. Crabtree is hereby accepted at Nome, Alaska, this 20th day of Feby., 1907, by receiving a copy thereof.

_____,
Atty's for Plff's.

[Endorsed:] 1636. Original. In the District Court for the District of Alaska, Second Division. Joseph Hammer, et al., Plaintiffs, vs. F. H. Waskey, et al., Defendants. Answer of Defendants J. M. Crabtree and F. H. Waskey. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Feb. 20, 1907. Jno. H. Dunn, Clerk. By _____, Deputy. Z. Albert Fink and Ira D. Orton, Attorneys for Def'ts. Crabtree and Waskey.

28 In the District Court for the District of Alaska, Second Division.

JOS. HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,

vs.

F. H. WASKEY, J. CRABTREE, J. POTTER WHITTREN and ANDREW EADIE, Defendants.

Reply [to Answer of F. H. Waskey et al.].

Come now the above-named plaintiffs and replying to the answer of F. H. Waskey and J. Crabtree filed herein, admit, deny and allege:

1.

Deny each and every allegation, matter and thing contained in said defendants' further, separate and affirmative answer, save and except plaintiffs admit that said defendants are in possession of the premises, described in plaintiffs' complaint herein.

And for a further, separate and affirmative reply to the answer of said defendants, plaintiffs allege:

1.

That between the 31st day of December, 1902, and the 1st day of January, 1904, no work or labor was performed, or improvements made on or for the said Bon Voyage mining claim, location set forth in the answer of said defendants F. H. Waskey and J. Crabtree, which said alleged location includes the premises in controversy by J. Potter Whittren, the alleged locator thereof, or by any person or persons acting for or in his behalf to the value of One Hundred Dollars, or any other sum whatsoever. Nor did the said J. Potter Whittren, or any person acting for him or in his behalf, after the 31st day of December, 1903, resume work upon said mining claim. That thereupon and before said J. Potter Whittren or any person acting for or in his behalf had resumed work on said placer mining claim the plaintiff B. Schwartz located that certain placer mining claim known as and called the Golden Bull placer mining claim, which includes within its exterior boundaries all of the premises in controversy and described in plaintiffs' complaint herein, in pursuance of the mineral land laws of the United States, and did all and singular each and everything requisite and necessary to be done in and about the premises to make a valid mining location under the mineral land laws of the United States, and the local rules, regulations and customs of the District wherein said claim was situated, whereby the claim of said defendant J. Potter Whittren in and to said premises became forfeited, and the plaintiff B. Schwartz became the owner thereof in fee under and by virtue of a valid and subsisting mining location made as aforesaid, and ever since said time any title, claim or right of possession that the said defendant J. Potter Whittren and his successors in interest had in and to said premises became forfeited as aforesaid, and plaintiff B. Schwartz and his co-plaintiffs to whom he has conveyed a portion of his interest in said claim, ever since have been and now are the owners in fee and entitled to the possession of the said premises, and the whole thereof.

Wherefore plaintiffs having fully replied to the answer of said defendants, demand judgment as set forth in plaintiffs' complaint.

T. M. REED,
ELWOOD BRUNER,
J. ALLISON BRUNER,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
District of Alaska, ss:

Otto Halla, being first duly sworn, deposes and says: That I am one of the plaintiffs in the above-entitled action; that I have heard read the foregoing reply; know the contents thereof, and the same is true as I verily believe.

OTTO HALLA.

Subscribed and sworn to before me this 28th day of March, A. D. 1907.

[NOTARIAL SEAL.]

T. M. HOSKING,
Notary Public in and for the District of Alaska.

UNITED STATES OF AMERICA,
District of America, ss:

Due service of the within Reply is hereby accepted, in the District of Alaska, this — day of March, 1907, by receiving a duly certified copy of the same.

IRA D. ORTON,
Attorney for —.
O. D. COCHRAN,
M. S.,
Att'ys for Whittren & Eadie.

31 [Endorsed:] No. 1636. In the District Court, District of Alaska, Second Division. Jos. Hammer et al., Plaintiffs, vs. F. H. Waskey et al., Defendants. Reply to Answer of F. H. Waskey and J. Crabtree. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Mar. 28, 1907. Jno. H. Dunn, Clerk. By — — —, Deputy. T. M. Reed, Elwood Bruner, J. Allison Bruner, Attorney- for Pl't'fs, Nome, Alaska.

In the District Court for the District of Alaska, Second Division.

JOS. HAMMER, B. SCHWARZ, and OTTO HALLA, Plaintiffs,
vs.
F. H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and ANDREW EADIE, Defendants.

Reply [to Answer of J. Potter Whittren et al.].

Come now the above-named plaintiffs and replying to the answer of J. Potter Whittren and Andrew Eadie filed herein, admit, deny and allege:

1.

Deny each and every allegation, matter and thing contained in said defendants' further, second, separate answer and defense.

And for a first, further, separate and affirmative reply to the answer of said defendants, plaintiffs allege:

32

1.

That they are informed and believe that the defendants J. Potter Whittren and Andrew Eadie claim the property described in plaintiffs' complaint as a placer mining claim, located under the laws of the United States.

That said J. Potter Whittren claims to have located the said premises on the first day of January, 1902. That at the time the

said J. Potter Whittren claims to have located the said premises the same were not open for location; that the said premises had theretofore been located and occupied by other persons who had entered thereon prior to the attempted location thereof by the said J. Potter Whittren, and located the same as a placer mining claim in manner provided by the laws of the United States. That at the time of the said J. Potter Whittren's attempted location of said premises, the said prior locations thereof were still valid and subsisting, and had not been abandoned or forfeited.

And for a second, further, separate and affirmative reply to the answer of said defendants J. Potter Whittren and Andrew Eadie, plaintiffs allege:

1.

That plaintiffs are informed and believe that the said defendants J. Potter Whittren and Andrew Eadie claim the property described in plaintiffs' complaint as a placer mining claim located under the laws of the United States known as and called the Bon Voyage.

That the said J. Potter Whittren claims to have located the said premises on the first day of January, 1902.

33

2.

That between the 31st day of December, 1902, and the 1st day of January, 1904, no work or labor was performed or improvements made on or for the said Bon Voyage Mining Claim, which said alleged location includes the premises in controversy by said defendants or any person or persons acting for them or in their behalf to the value of One Hundred Dollars or any other sum whatsoever. Nor did the said defendants or any persons acting for them or in their behalf after the 31st day of December, 1903, resume work upon said mining claim; that thereupon and before said defendants or any person acting for or in their behalf had resumed work on said placer mining claim, the plaintiff B. Schwartz located that certain placer mining claim known as and called the Golden Bull placer mining claim, which includes within its exterior boundaries all of the premises in controversy and described in plaintiffs' complaint herein, in pursuance of the mineral land laws of the United States, and did all and singular each and every thing requisite and necessary to be done in and about the premises to make a valid mining location under the mineral land laws of the United States, and the local rules, regulations and customs of the District wherein said claim was situated, whereby the claim of said defendants in and to said premises became forfeited and the plaintiff B. Schwartz became the owner thereof in fee under and by virtue of a valid and subsisting mining location made as aforesaid, and ever since said time any title, claim or right of possession that the said defendants had in and to said premises became forfeited as aforesaid, and plaintiff B. Schwartz and his co-plaintiffs, to whom he has conveyed a portion of his interest in said claim, ever since have been and now are the owners in fee and entitled to the possession of the said premises, and the whole thereof.

34

Wherefore, plaintiffs having fully replied to the answer of said defendants, demand judgment as set forth in plaintiffs' complaint.

T. M. REED,
ELWOOD BRUNER,
J. ALLISON BRUNER,
Attorneys for Plaintiffs.

UNITED STATES OF AMERICA,
District of Alaska, ss:

Otto Halla, being first duly sworn, deposes and says: That I am one of the plaintiffs in the above-entitled action; that I have heard read the foregoing reply, know the contents thereof and the same is true as I verily believe.

OTTO HALLA.

Subscribed and sworn to before me this 28th day of March, A. D. 1907.

[NOTARIAL SEAL.]

T. M. HOSKING,
Notary Public in and for the District of Alaska.

35 UNITED STATES OF AMERICA,
District of Alaska, ss:

Due service of the within Reply is hereby accepted, in the District of Alaska, this — day of March, 1907, by receiving a duly certified copy of the same.

O. D. COCHRAN,
M. S.,
Attorney for Whittren and Eadie.
IRA D. ORTON,
Att'y for Waskey & Crabtree.

[Endorsed:] No. 1636. In the District Court, District of Alaska, Second Division. Jos. Hammer et. al., Plaintiffs, vs. F. H. Waskey et al., Defendants. Reply to Answer of J. Potter Whittren and Andrew Eadie. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Mar. 28, 1907. Jno. H. Dunn, Clerk. By — — —, Deputy. T. M. Reed, J. Allison Bruner and Elwood Bruner, Attorney- for Pl'tffs, Nome, Alaska.

In the District Court for the District of Alaska, Second Division.

JOS. HAMMER, B. SCHWARTZ, and OTTO HALLA, Plaintiffs,
vs.
FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and ANDREW EADIE, Defendants.

36 *Verdict.*

We, the jury in the above-entitled action, find a verdict in favor of the plaintiffs; that the plaintiffs are entitled to the possession of

the lands and property described in their complaint, described as follows, to wit:

Commencing at the northeast corner of the Golden Bull Placer Mining Claim; thence running by magnetic courses south $27^{\circ} 15'$ E. 630 ft.; thence south 45° W. 695 ft., thence north $27^{\circ} 30'$ W. 495 ft.; thence north $35^{\circ} 10'$ east 747 ft. to the place of beginning, containing about 8.55 acres, said premises being a portion of the Golden Bull placer mining claim and situated within the exterior boundaries of said claim; the northeast corner of said Golden Bull claim being identical with the southeast corner of the Roosevelt placer mining claim and at the foot of the divide, south of Newton Gulch, known as Gold Hill, in Cape Nome Mining and Recording District, District of Alaska.

That the plaintiffs are the owners in fee and the owners of the right to the possession of said property, and entitled to the possession of the same, and the whole thereof.

We further find that the plaintiffs are entitled to recover damages against the defendants, and assess the amount of damages in the sum of 75 cents.

BERNARD O'REILLY, *Foreman.*

37 [Endorsed:] No. 1636. In the District Court, District of Alaska, Second Division. Jos. Hammer et al., Plaintiffs, vs. Frank H. Waskey et al., Defendants. Verdict. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Sep. 9, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. J. Allison Bruner, Elwood Bruner, T. M. Reed, Attorney- for Pl't'ffs, Nome, Alaska.

[Motion to Set Aside Verdict and for a New Trial.]

In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER et al., Plaintiffs,

vs.

FRANK H. WASKEY et al., Defendants.

Come now the defendants in the above-entitled action and move the Court to set aside the verdict in the above-entitled action and grant a new trial therein, upon the following grounds:

I.

Insufficiency of the evidence to justify the verdict.

II.

Errors in law occurring at the trial and excepted to by the defendants and each of them, as follows:

38 Error of the Court in directing the Jury to find a verdict for the plaintiffs and against the defendants for the land in controversy.

ALBERT FINK,
IRA D. ORTON,
F. E. FULLER,
O. D. COCHRAN,
Attorneys for Defendants.

Service admitted Sept. 11, 1907.

ELWOOD BRUNER,
T. M. REED,
J. ALLISON BRUNER,
Att'ys for Pl't'ffs.

[Endorsed:] #1636. Original. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs. Frank H. Waskey et al., Defendant. Motion for New Trial. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Sept. 11, 1907. Jno. H. Dunn, Ira D. Orton, Attorney- for Defendants.

39 [*Minutes Relative to Overruling of Motion for New Trial, etc.*]

In the District Court for the District of Alaska, Second Division.

Term Minutes, Special October, 1907, Term, Begun and Held at the Town of Nome, in said District and Division, October 7, 1907.

WEDNESDAY, November 6, 1907—at 10 a. m.

Court convened pursuant to adjournment.

Present:

Hon. Alfred S. Moore, Judge.
John H. Dunn, Clerk.
Angus McBride, Deputy Clerk.
Geo. G. Grigsby, Acting U. S. Attorney.
Thos. C. Powell, U. S. Marshal.

Now upon the convening of Court the following proceedings were had:

#1636.

HAMMER et al.

vs.

WASKEY et al.

The Court rendered a decision overruling motion for new trial. On motion of Ira D. Orton, defendants were granted thirty days' additional time to file bill of exceptions and a stay of execution for same length of time.

40 In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER, B. SCHWARZ, and OTTO HALLA, Plaintiffs,
vs.

FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTREN, and
ANDREW EADIE, Defendants.

Judgment.

The above-entitled action having, on the 6th day of September, 1907, regularly come on for trial, Elwood Bruner, J. Allison Bruner and T. M. Reed appearing as attorneys for plaintiffs; Albert Fink, Ira D. Orton, C. D. Murane and W. A. Gilmore appearing for defendants, Frank H. Waskey and J. Crabtree; and F. E. Fuller and O. D. Cochran appearing for defendants J. Potter Whittren and Andrew Eadie; and a jury of twelve persons having been regularly impaneled and sworn to try said action, and witnesses on behalf of the parties thereto having been sworn and examined and documentary evidence introduced; and after hearing all the evidence and the Court having instructed said jury to find a verdict for the plaintiffs, the said jury did find by their verdict for the plaintiffs and against the defendants, as follows:

41 "We, the jury in the above-entitled action, find a verdict in favor of the plaintiffs; that the plaintiffs are entitled to the possession of the lands and property described in their complaint, described as follows, to wit:

Commencing at the northeast corner of the Golden Bull Placer Mining Claim, thence running by magnetic courses south $27^{\circ} 15'$ 630 ft.; thence south $45^{\circ} W.$ 695 ft.; thence north $27^{\circ} 30' W.$ 495 ft.; thence north $35^{\circ} 10'$ east 747 ft. to the place of beginning, containing about 8.55 acres, said premises being a portion of the Golden Bull placer mining claim and situated within the exterior boundaries of said claim; the northeast corner of said Golden Bull claim being identical with the southeast corner of the Roosevelt placer mining claim and at the foot of the divide, south of Newton Gulch, known as Gold Hill, in Cape Nome Mining and Recording District, District of Alaska.

That the plaintiffs are the owners in fee and the owners of the right to the possession of said property, and entitled to the possession of the same, and of the whole thereof.

We further find that the plaintiffs are entitled to recover damages against the defendants, and assess the amount of damages in the sum of seventy-five cents.

BERNARD O'REILLY,
Foreman."

Wherefore, by virtue of the law, and by reason of the premises aforesaid,

It is ordered and adjudged that the plaintiffs are the owners in

fee under and by virtue of a valid and subsisting mining location of the following described placer mining claim, to wit:

42 "Commencing at the northeast corner of the Golden Bull Placer Mining Claim, thence running by magnetic courses south $27^{\circ} 15'$ E. 630 ft.; thence south 45° W. 695 ft.; thence north $27^{\circ} 30'$ W. 495 ft.; thence north $35^{\circ} 10'$ east 747 ft. to the place of beginning, containing about 8.55 acres, said premises being a portion of the Golden Bull placer mining claim and situated within the exterior boundaries of said claim; the northeast corner of said Golden Bull claim being identical with the southeast corner of the Roosevelt placer mining claim and at the foot of the divide, south of Newton Gulch, known as Gold Hill, in Cape Nome Mining and Recording District, District of Alaska."—being the premises described in the complaint of plaintiff and involved in the trial of this action.

It is further ordered and adjudged that the plaintiffs are the owners of the right to the possession and are entitled to the possession of the aforesaid placer mining claim, and the whole thereof, and,

It is further ordered and adjudged that the plaintiffs do have and recover of defendants damages in the sum of seventy-five cents.

It is further ordered and adjudged that plaintiffs do have and recover of defendants Frank H. Waskey, J. Crabtree, J. Potter Whittren and Andrew Eadie, and each of them, the possession of the aforesaid placer mining claim, and the whole thereof, and that plaintiffs do have and recover from the defendants Frank H. Waskey, J. Crabtree, J. Potter Whittren and Andrew Eadie, jointly and severally the sum of — Dollars and — cents, taxed as costs and disbursements in the above-entitled action.

43 Done in open court this 9th day of November, A. D. 1907.

ALFRED S. MOORE,
District Judge.

[Endorsed:] No. 1636. In the District Court, District of Alaska, Second Division. Joseph Hammer et al., Plaintiffs, vs. Frank H. Waskey et al., Defendants, Judgment. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Nov. 16, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Elwood Bruner, J. Allison Bruner, T. M. Reed, Attorney for Plaintiffs. Nome, Alaska. Comp. Vol. 5, Orders and Judgments, p. 563. McB. J. D. 2, page 45.

[Bill of Exceptions.]

In the District Court for the District of Alaska, Second Division.

JOSEPH HAMMER et al., Plaintiffs,

vs.

FRANK H. WASKEY et al., Defendants.

The above-entitled action coming on regularly for trial on the 6th day of September, 1907, before the Hon. Alfred S. Moore, Judge of

the above-entitled court, whereupon a jury of twelve persons were duly impaneled.

44 The plaintiffs were represented by Messrs. Elwood Bruner, J. Allison Bruner and T. M. Reed, their attorneys, and the defendants by Messrs. Albert Fink, O. D. Cochran, W. A. Gilmore, Ira D. Orton and C. E. Murane.

The following were the proceedings at the trial:

After the jury were sworn, the opening statement for the plaintiffs was made by Mr. Elwood Bruner, and for the defendants by Mr. O. D. Cochran.

(Testimony of B. Schwartz.)

Thereupon B. SCHWARTZ, one of the plaintiffs, called as a witness on his own behalf, after being duly sworn, testified as follows:

I am 40 years of age, a miner by occupation. Have been in Alaska since '97. I know Otto Halla. I have known him since '98. I had a talk with Otto Halla with reference to locating a claim in the Cape Nome District, with reference to the Golden Bull. This was on the 20th of December, 1903. As a result of that talk I went out there on the 27th or 28th of December, 1903. I examined the Golden Bull on that day. Before that time I had also examined the ground. I was on the ground first in '99. I made a discovery of gold upon the claim in 1901, towards fall or September. I made a discovery of gold upon the ground. The next day after the 28th of December, 1903, or the day following, I went over there with Otto Halla. I wanted Halla to show me the stake that is marked 3 on the map. I had found the other stakes 1, 2 and 4.

When I went out there with Mr. Halla he showed me stake 3. We went around the claim and went home again.

45 I next went on the ground on the 31st of December, for the purpose of staking that claim, the Golden Bull. I did not find within the limits of the Golden Bull any stake of any other claim. I staked the Golden Bull at 12 o'clock, January 1, 1904. I shaved off the stake that was standing at the point 1 (referring to map, Plaintiffs' Exhibit 1). The stake was standing there before designating the corner of the Golden Bull, and I wrote on it the initial stake of the Golden Bull, the date, and my name.

I then went to the point marked 4 on the map (referring to the same map), shaved off the stake that was standing there before, wrote on it northwest corner, Golden Bull, the date, 1st January, 1904.

Then I went to point marked 3 on the map, shaved off another stake that was standing there and wrote on it southwest corner, Golden Bull, and the date.

From there I went to point marked 2 on the same map and shaved off a stake standing there, and wrote on that southeast corner Golden Bull, the 1st of January, 1904.

The stakes that I shaved off were the old stakes of the Golden Bull staked in 1902 by Halla.

At this point the following question was asked the witness:

Q. State whether or not it was before or after 12 o'clock the night of December 31st that you staked that.

A. At 12 o'clock exactly.

The witness, continuing, testified: I placed my location notice on the stake at the point 1 on this map. I placed my location notice on that stake when I shaved it off. I put the location notice on the initial stake and left it there.

At this point a paper was shown the witness and he testified concerning it that it was a copy of the notice posted by him, and that he afterwards placed it of record in the Recorder's Office of the Cape Nome Recording District. The paper was thereupon admitted in evidence and read to the jury, marked Plaintiffs' Exhibit No. 2, and was, with the endorsements thereon, in words and figures as follows:

DEFENDANTS' [PLAINTIFFS'?] EXHIBIT 2.

No. 25053.

Notice of Location.—Placer Claim.

Notice is hereby given that the undersigned, having complied with all the Requirements of the Revised Statutes of the United States, claims by right of discovery of Gold and location the following within the boundaries hereinafter described Placer Mining Ground of 20 acres, to wit:

Commencing at this the Initial stake where a copy of this notice is posted, being also the N. E. corner of the claim, and being also identical with the S. E. corner of the Roosevelt claim, thence in a Westerly direction to 1320 feet to the N. W. corner of the claim, being a sod monument of about 3 feet high, with a stake in the center, thence in a Southerly direction 660 feet to the S. W. corner of the claim being identical with the N. W. cor. of the Golden Calf Claim, thence in an Easterly direction to the S. E. cor. of the claim, 1320 feet, being identical with the N. E. cor. and initial stake of the Golden Calf claim, thence in a Northerly direction 660 feet to the Initial stake or place of beginning.

This claim is situated on the divide between Newton Gulch a trib. to Dry Creek and Fox Creek a trib. to Otter creek a trib. to Nome River, in the Nome Mining District, District of Alaska, and being known as the Golden Bull Claim. This claim is identical-y the same as located by M. Roth in the year 1902.

Located this the 1st day of January, 1904.

Locator: B. SCHWARZ.

Witness:

OTTO HALLA.

Filed for record at request of B. Schwartz, Jan. 20, 1904, at 3:10 P. M.

T. M. REED, *Recorder.*
W. W. SALE, *Deputy.*

(Vol. 133, page 423.)

UNITED STATES OF AMERICA,
District of Alaska,
Precinct of Cape Nome, ss:

I, F. E. Fuller, United States Commissioner and Ex-Officio Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above and foregoing is a true, full and complete copy of Instrument numbered 25053, the same being notice of location—Placer

48 Claim—of Golden Bull, as the same appears of record in Volume 133, at page 423 thereof, of the records of my office.

Witness my hand and the seal of the said office this 2d day of May, 1907.

[SEAL.]

F. E. FULLER, *Recorder,*
 By F. R. COWDEN, *Deputy.*

[Endorsed:] "Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, May 6, 1907, Jno. H. Dunn, Clerk. By ———, Deputy."

The witness then testified further as follows: Otto Halla was with me at this time. Halla located another claim that evening. Halla became interested in this claim, the Golden Bull, at the time I staked it. He had a half interest. I conveyed him a half interest, as I had agreed. Mr. Hammer has a quarter interest.

On cross-examination the witness testified as follows:

Mr. Halla located one of the claims that night, the Golden Calf. That was the claim marked Coffee on this map.

At this point in the trial two maps were admitted in evidence, without objection, one introduced by the plaintiffs, marked Plaintiffs' Exhibit No. 1, and the larger map by the defendants, marked Exhibit No. X.

(Here follow maps marked pp. 49 & 50.)

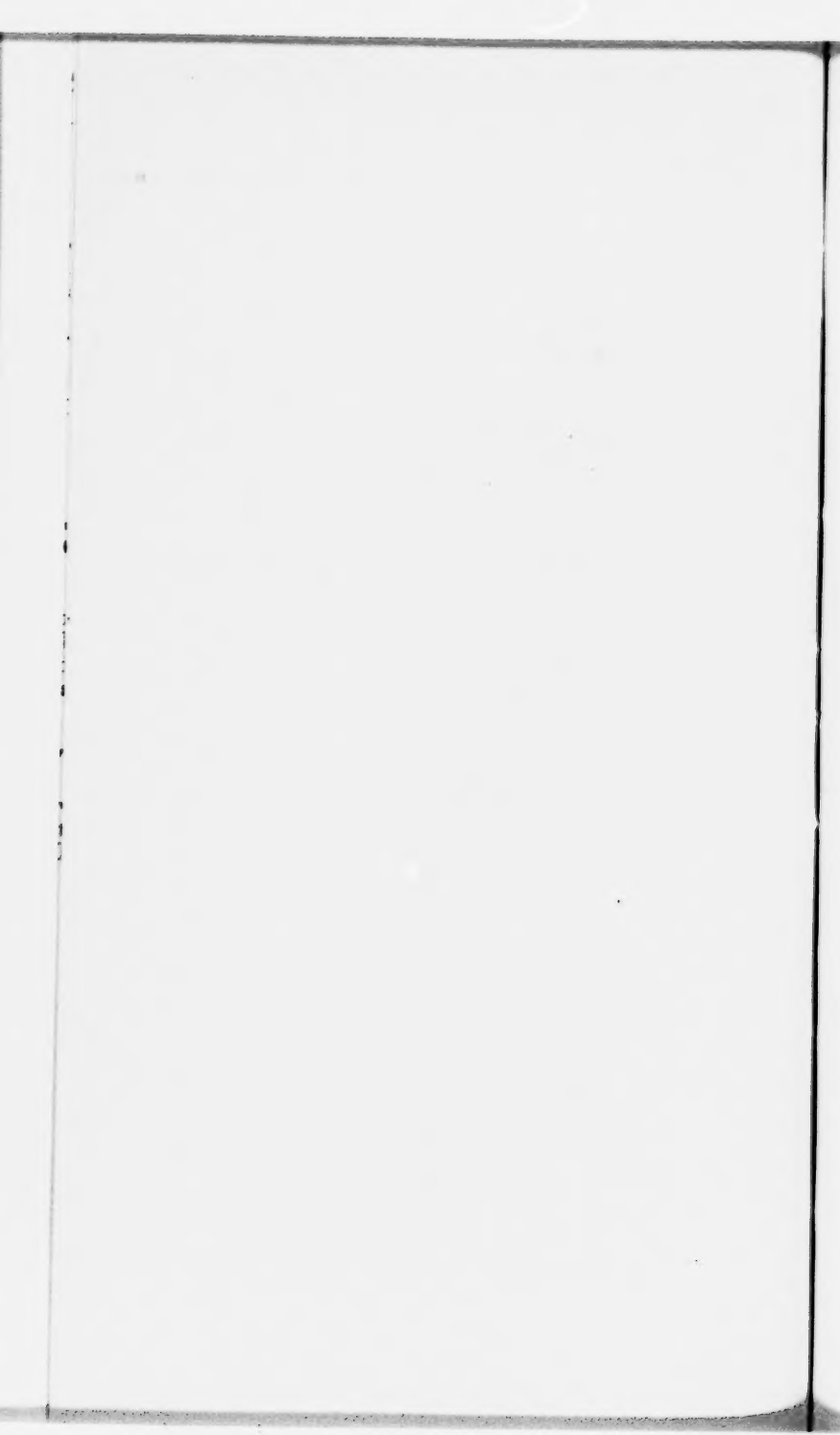
CHARTS

TOO

LARGE

FOR

FILMING



51 The witness then proceeded to testify: Referring to Plaintiffs' Exhibit No. 1, the Golden Calf began at point 2 and came to the point which is marked 5, then to the point which is marked 6, then over to the point which is marked 7. Mr. Halla located no other ground that night, January 1, 1904. I was out there the first time in December, '99. I was looking over the country. I attempted to stake one claim, but I never recorded it. I don't know the exact location. I put in one stake but never marked the boundaries, nor ever recorded it. I called it Vasudeva. That is a Sanskrit word and means the highest maxim in man, is identical with the highest maxim in the world at large. I wrote out the location notice and put it on a stake, subsequently abandoned the ground.

I have been mining 12 or 13 years in Alaska and elsewhere. After '99 I was first on the Golden Bull in 1901. I went out to stake a claim but didn't stake any. The next time was in 1903. In 1901 when I was out there I panned and found prospects. I was looking for an old channel. I had it in my mind that the country looked like there would be an old channel from Newton Gulch. I had looked the country over pretty well in '99. I don't know what brought upon me the idea that it might be an old channel
52 from Newton Gulch going through there, but I went out to look over the country and see if the country looked like if an old channel would go through there, and when I came over there things didn't look as good as I thought it would look to me before I left town, that was the reason I didn't stake.

The location I made in 1904 I predicated on the discovery I made in 1901.

At the time we located we left town about half-past ten or eleven at night, went out with Otto Halla. He wanted to be a witness at the staking of the claim. He told me he had staked before, told me where it was. He told me to go out to stake it in my name, give him a half interest, and I agreed to do that. That was the substance of it, and that just happened to be the place where I had found gold in 1901.

On the stake that I shaved off at the northeast corner of the claim, there was on it marking designating that it was the northeast corner of the Golden Bull and the name Max Roth, I believe, and nothing else that I can remember. I first saw this stake in December, 1903. It was a round driftwood stake, 2½ inches through and 2½ feet high. There was a Roosevelt stake at the same point and a stake of the Pioneer Bench. There was no other stake that I remember.

At this point in the examination of the witness the following questions were asked and the witness made the following answers:

Q. No Bon Voyage stake there?

53 A. No—yes, there was a 2 by 2 stake there, about a foot high, seemed to be a new stake, I didn't know what stake it was.

Q. Did you look at it?

A. Yes, I looked at it.

Q. Nothing at all written on it?

A. I think there was northeast corner.

Q. Was that all?

A. That was written on the stake.

Q. There might have been B. V.?

A. I don't recollect it.

Q. Cut in with a knife or marked with a pencil?

A. I don't remember whether it was or not.

The witness then continued to testify: I shaved off the old stakes of the Golden Bull. Halla was with me. Told me I could take his stakes. He went out there to show me the claim. After I had trimmed it off I wrote on it initial stake of the Golden Bull the first of January, 1904, and my name, signed my name to it—B. Schwarz.

From point 1 on the map I went to point 4. Found another Golden Bull stake there, shaved it off. I believe it was a kind of a board stake, taken from a dry goods box or potato crate. Otto Halla was with me. From there I went to the point No. 3 on the map. Found a stake there marked Golden Bull, shaved it off the same way, and marked the same kind of writing on it. It was a stake taken from an old barrel. I then went to the point 2 and did the same thing.

54 OTTA HALLA, a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

My name is Otto Halla. I am a miner by occupation. Have been since '99 in Nome. I am acquainted with the ground between Newton Gulch and Fox Creek, shown on the map. I became acquainted with it in 1902, July. In 1902 I spent about eight days in that neighborhood, examining the stakes, and examining the ground with a view of locating. I have known Mr. Schwarz since '98 in Dawson. I saw him in 1902. Had a conversation with him in 1903 with reference to locating the claim, the Golden Bull. I have known the Golden Bull since 1902, July 31st, having located it on that day for Max Roth. He left the country in 1903 and has not been back since. In 1903 I had a talk with Mr. Schwartz with reference to that claim. I had put out monuments and located the ground and had prospected the ground. In 1903 I took Mr. Schwartz to the ground and showed him the location of the Golden Bull. I was present when Schwartz staked it. That was on January 1st, 1904, between the hours of 12 o'clock and 1 A. M. We went out together from Nome. Mr. Schwartz commenced at point 1 (indicating on Map) the northeast corner. He adopted the same stakes I had used there for the Golden Bull location of Max Roth, where he placed his location notice, which I had prepared the evening before, and he went to No. 4, then to 3, and then to No. 2. He put the location notice on the first stake, made a slit in it, a beechwood stake. He marked
55 that stake Initial Stake and northeast corner of the Golden Bull, and signed his name to it, and I signed my name as a witness on the stake. I believe I signed the others. I would not be sure. There was an agreement between myself and Mr. Schwarz as to the ownership of the claim. This agreement was that he was to give me a half interest for assisting him in locating the

claim. This agreement was fulfilled. Prior to that time in July, 1902, I had discovered gold in the claim. I panned, made a discovery of gold, not very far from stake No. 3, about 250 feet east from stake No. 3. The driftwood stake was about 2½ feet long, round, and about 2 inches in diameter. At No. 4 there was a stake, a piece of a potato crate, about 2 feet high, flat and about 3 inches wide, and about a half inch through, placed in a monument; at point 3 there was a barrel stave, which I found in 1902 on Fox Creek, and at point 2 was also a piece of a potato crate and these were all placed in permanent mounds. The location as made by Schwarz in 1904 was identical with the one made by me in 1902 for Max Roth. The stakes were placed in the same mounds. On this claim Mr. Roth did not do the assessment work.

Upon cross-examination, the witness testified as follows: I am a mining operator rather than a miner. I do not own 13,000 acres.

56 I do not know what I own. I first became acquainted with the ground covered by the Golden Bull in July, 1902. I made a location of it for Max Roth July 31, 1902, I had an agreement at that time that I should get a half interest in the property but I didn't get it. I located the ground as designated by the figures 1, 4, 3 and 2 on Plaintiffs' Exhibit 1. No assessment work was done on the Max Roth location in 1903. I expected the ground to become open. Mr. Schwarz came to me about the ground. I told him about this Golden Bull. I told him that there was a piece of property some parties wouldn't do the assessment work on that he may relocate it on Jan. 1st. I was to have a half interest with Max Roth under that location, but never got it. I thought the ground was likely valuable. I didn't locate it in my own name for several reasons, one was I realized I could not do the assessment work on all the claims I have located in that neighborhood without some financial assistance, and by getting in somebody that will do the work I expected that I would be able to hold the ground, that I would be able to divide up the ground, the agreement with the partners in very many cases was that they should open up the ground, that they should dig some holes and open up the ground, open up the country. That is the principal reason. I have not been actually financially able to look after all my property alone. I didn't know how many properties I have. [It is not a fact that Mr. A. McB.

57 Schwarz and myself went in to forfeit the location of Max Roth and beat him out of his half interest.]* I did not intend to do the assessment work on this ground in 1903. I never got the deed from Max Roth, consequently I did not own my interest in it. I did not own any interest in the Golden Bull at the time I told Schwarz to locate it. My contract with Roth was not complied with. The agreement was not lived up to. Under the agreement I had with Schwarz I had a half interest in this ground for assisting him, helping in the location. I took him out and showed him the stakes about the 28th day of December, 1903, and again on the 1st day of January, 1904. I went around with him to

[* Words and figures enclosed in brackets erased in copy.]

all the stakes, pointed them out to him, I didn't assist in shaving the stakes. He shaved them himself. I knew he was going to locate it in his own name. The evening before it was located, in my cabin, I wrote out the location notice on the typewriter, a copy of which is offered in evidence. I believe he made the deed to me in March, the 23d of March, 1904.

The deed of a one-half interest in the property from B. Schwarz to Otto Halla was here produced, and the witness further testified:

This deed was made in fulfillment of the agreement I had with him. The original agreement was not in writing. I had been over this ground a great deal, examining the country and the stakes, with a view to making the locations.

Upon redirect examination the witness testified as follows:

58 Q. You was asked with regard to this talk that you had with Mr. Schwartz going out there, in regard to that, the conversation in regard to that, was there anything said with regard to the discovery of gold made upon the claim?

Mr. ORTON: Objected to as leading, hearsay, immaterial and incompetent.

Q. As to whether there has been any communication of the fact by Halla to Schwartz that he had made a discovery of gold?

Mr. ORTON: Objected to as immaterial, irrelevant, incompetent, hearsay and leading.

The COURT: Overruled.

Mr. ORTON: Exception taken by the defendants.

A. I told Schwartz that I had made a discovery of gold in 1902

The plaintiffs here rested their case.

The foregoing is the substance of all the testimony introduced on behalf of the plaintiffs.

J. POTTER WHITTREN was thereupon called as a witness on behalf of the defendants, and after being duly sworn, testified as follows:

I am engaged in mining and surveying. I have lived in Nome since 1900. I know a claim in this District called the Bon Voyage. I first became acquainted with this ground in the latter part of September, 1901. I knew the ground was open out there, a particular portion of the ground, and I went out to examine it and
59 found it. That was in the latter part of September or the early part of October, 1901. At that time I staked about 25 acres of it. I guess I staked a big claim. Made a discovery, put up the stakes, and came back to Nome. That was in September, 1901, or the early part of October. I got the stakes from Dry Creek, back of our cabin, from a pile of driftwood there.

I see the map on this wall, marked Defendants' Exhibit "X," and the ground marked the Bon Voyage. I put the upper center stake at point 1 on this map in September or early October. I put in five

stakes in all. The upper center stake was an ordinary round driftwood stake, an inch and a quarter in diameter about. I did not write anything on it at that time. Just drove it in the ground through about three inches of frost with a pick, and put the next stake at the point 2, in a clump of willows, in the brow of the hill that was known as Gold Hill. That is the hill northeast of the claim. I put one of these driftwood stakes at the point 2, put it in the ground, in a similar manner, then I lined up this stake and that stake (referring to the center stake) with the south peak of Sledge Island, a little -nob on the southerly extremity.

I then put a stake at the point 5 on this map in line with the south peak of Sledge Island. I have since that time examined that north line with reference to the south peak of Sledge Island and it is identical. At the point 5 I put in another driftwood stake. These stakes were in the neighborhood of about three feet long. Point 5 was the northwesterly corner of the Bon Voyage and point 2 the northeasterly corner.

After leaving the northwesterly corner I turned a right angle, a fairly good right angle, sighted for some object on the beach, and came down and put a stake at point 12 on this map, similar in size to the other stakes, planted it in the ground in the same way. From there I turned, as near as I could, a right angle to the point marked 3 and 10, and put in the southeast corner stake similar driftwood, similarly planted in the ground. There was no writing upon the stakes at that time. I had a pick and shovel and a pan and sunk a hole at the northwest corner and made a discovery of gold. I think the hole was about 4 feet deep. No one was with me at the time. I panned there and found colors of gold, indications of gold. I found gold, that was all I could say. The character of the ground was that it was a slide, in the nature of a slide. I got the prospects in a blue clay and broken rock. I was on the ground again December 25th, Christmas day, 1901. Upon returning to town there was a man by the name of Brown, Charles Brown, came to town with me. On the 25th of December, 1901, I just went out there to be able to locate and find my stakes, upon the first of January, because the ground when

I was out there was bare and now there was several feet of snow, two or three feet, and I went out to locate my stakes so that I could find them on the first of January, because the ground when I was there was bare and now there was several feet of snow. I found my stakes. After finding these stakes, I had broken into Dry Creek and went into a cabin on Dry Creek, where I found a man named Hannan. I stopped, dried my stockings, and he set up a lunch for me. Directly after leaving the cabin Brown and myself came to town together, came right across the Bon Voyage claim to town. I showed the stakes to Charlie Brown. I just stated that this was my claim; didn't go up and point each stake out to him.

I was back there at half-past eight o'clock, January 1, 1902. I left Nome on the night of December 31st; went to Little Creek and Extra Dry; came back to this claim in the morning. I then put the location notice on the initial stake. The first stake I found was at the northeast corner, in the bunch of willows at point two. I

scribed it with the letters "B. V." No. 4; then went to the initial stake, put my location notice on it, scribed that "B. V." As near as I could pace it, it is a little over 300 feet from the northeast to the initial stake. The initials "B. V." represented Bon Voyage. I put the location notice in a slit in the top of the initial stake. I marked the stake with a scribe, which is an instrument used by engineers to cut wood in marking it. I then went to point 5, 62 the northwest corner of the Bon Voyage and marked that stake, scribed it in the same manner. I scribed all the stakes in that way in a similar manner. The distance from the northeast to the northwest corner was about 660 feet, and from the northwest corner to the southwest corner was supposed to be 1320 feet. It turned out afterwards to be a little longer than that. The distance from the southwest to the southeast corner was supposed to have been 660 feet. It was about that. I filed the location notice, filed it for record.

I was next back on the claim on November 11, 1903, as near as I can remember. I was taking a man out to start in to work representing, also taking my transit out and surveying the claim and tying in the corners. I was a United States Deputy Mineral Surveyor then in 1903. I made a survey of it. Mr. Lang and Mr. Taft were with me for the purpose of assisting me. They went out upon the claim with me and went round the claim. I did the instrument work then, and they did the measuring, taping, carried the tape. We started in at the northeast corner, where a clump of willows were, point 2 on the map, Defendants' Exhibit X. I have the field-notes of that survey. I had a transit, tape and pins, steel tape, ordinary surveyor's steel tape, 100 feet long. The tape was stamped correct by the United States Government, and was the special tape for that kind of work. Started at point 2, northeast corner, put in a new stake at that point, 2x2. I found 63 a stake placed by me in 1901 at that point after considerable trouble. Found it where that No. 2 stake now stands. The markings were not decipherable at once. It seems to me the stake was marked Max Roth, by Otto Halla, July 10th, or something like that, 1902. The stake which Otto Halla used was the original stake which I had placed there, the northeast corner stake. It had been whittled off nearly, but there was enough left so that I could decipher the "B. V." From point 2 at the northeast corner I took bearings on Sledge Island. The compass on the transit was broken and I took the angle with the vernier. My field-notes show from the northeast corner to the northwest corner, hit the south peak of Sledge Island. That is the same as I originally staked it, lined up the same. It hit the center of the peak. When I put the instrument on I hit the center of the south peak of the contour of Sledge Island. This stake, which I found at the northeast corner of the Bon Voyage, having written on it Max Roth, and having exposed thereon a part of the scribing "B. V." I took up because I considered it my property and brought it back to Nome and put it in Dr. Westby's Building, down on Front street. It remained there until it was burned up in the fire. The purpose for which I took

this stake was in case of trouble arising over this claim I could have that to defend it. You could make out the scribing underneath the writing, if you knew the "B. V." was there. You
64 could see part of the cutting, the number had been erased, originally marking the corner "No. 4 B. V." The "No. 4" you could not make out, but you could make out part of the "B. V." All the stakes planted by me when I surveyed the claim was 2 by 2's, each designating the point "N. E. B. V."; "N. W. B. V."; "S. E. B. V."; "S. W. B. V." At the northeast corner I placed a stake 2 by 2 inches with a nail driven in the top to designate the point, and it was scribed "N. E. B. V." and driven in the ground. The bottom of that stake is there yet. It has been burned by a tundra fire. We found the bottom of it in 1906 and mailed a new stake to it. That stake remained there from the 11th of November, 1903, until the same was burned by tundra fire. In 1903, when surveying, I didn't take in the initial stake at all. I took up the four stakes there, the corners, by making the survey and tying each corner in regardless of the initial stake. I ran a line from the points 10 to 2 that day. I made the angles of the claim 90 deg. From the northeast to the northwest corner is 660 feet. I had to pull in the northwest corner. It was about 20 feet out. I pulled it in so as to make it exactly 660 feet. I then turned a right angle and ran down to the southwest corner. I measured down 1320 feet and put up a stake at the point 4 instead of the point 12. I found the claim was going to be over 20 acres. I was cutting down the excess. I then turned a right angle and ran to the southeast corner. We
65 may have moved that a foot more or less; that line was about right. We made the distance 660 feet. We ran it back, checked back to the northeast corner. I made the original field-notes November 11th, 1903, on the ground.

On cross-examination, the witness testified as follows:

I first put the original stakes on the Bon Voyage September, 1901. I intended to locate it January 1, 1902. I didn't locate it in September because the ground was not open. I had reason to believe there were conflicting locations. I had never been over the ground before the latter part of September or first of October. I had examined the Recorder's office to find if anything conflicted out there, and was looking for a particular claim. I found one stake of it, but don't remember now what the name of it was. I was looking for a claim staked and recorded by D. W. Waldron, and I found the one stake about at the point marked two on Defendants' Exhibit "X." As near as I can remember, it was a claim known by the name of the Gold Hill Claim. I did not tie to the Waldron stake, because I did not consider it a permanent tie. The Bon Voyage claim was not tied to anything outside of 1500 feet in a certain direction from Newton Gulch at that time, and afterwards, when I surveyed it in November, 1903, I tied the claim to permanent objects. The Waldron stake I found was just a willow out from the bunch there
in the clump. The clump of willows have been removed.

66 Upon further redirect examination, the witness testified as follows:

A paper being handed to the witness he identified it as a copy of the Location Notice posted on the Bon Voyage claim on the 1st day of January, 1902; and thereupon the copy being a certified copy of said location notice, recorded in Vol. 99, page 296, Records of said District of Alaska, was admitted and read in evidence, without objection as follows:

DEFENDANT'S EXHIBIT 5.

#13772.

Location Notice.

Notice is hereby given, that the undersigned, in compliance with the requirements of Revised Statutes of the United States, and the local customs laws and regulations has staked 20 acres of ground by right of location and discovery, for placer mining purposes, situate in the Cape Nome Recording District, District of Alaska, and more particularly described as follows to wit—Commencing at this initial stake which is situated about 1500 feet in a Southerly direction from the upper end line of Creek Claim No. 3 Below on Newton Gulch a tributary to Dry Creek and Snake River in the above-mentioned District, and being in the center of the North end line of said claim; thence 330 ft. in a westerly direction and parallel to to said Newton Gulch to corner stake No. 1; thence 1300 ft. in a Southerly direction and at right angles to corner stake No. 2; thence 660 ft. in an Easterly direction to corner stake No. 3; thence 67 1320 ft. in a Northerly direction to corner stake No. 4; thence 330 ft. to the initial stake or the place of beginning. This claim is more particularly situated as follows, to wit, being on the divide known as "Gold Hill," which is between Newton Gulch and Nome River and is next to one certain Bench claim known as the Gold Hill claim No. 1 staked and recorded by Thos. Wheeler.

This claim shall be known as "The Bon Voyage."

Located this 1st day of Jan., A. D. 1902, at 8:30 A. M.

J. POTTER WHITTREN.

Witness:

JAS. W. BAYNE.

Filed for record 9:26 A. M. 2d Jan. 1902, at request of J. Potter Whittren.

(Vol. 99, page 296.)

T. M. REED, *Recorder.*

E. WHITTARD, *Deputy.*

UNITED STATES OF AMERICA,

District of Alaska, Precinct of Cape Nome, ss:

I, F. E. Fuller, United States Commissioner and Ex-Offic-e Recorder in and for the Precinct of Cape Nome in the Second Judicial Division of the District of Alaska, do hereby certify that the above

**EXHIBITS
NOT
SUITABLE
FOR
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and foregoing is a true, full and complete copy of Instrument numbered 13772, the same being Location Notice of "The Bon Voyage" Claim, as the same appears of record in Volume 68 99, at page 296 thereof, of the records of my office.

Witness my hand and the seal of the said office this 2d day of May, 1907.

[SEAL.]

F. E. FULLER, *Recorder.*
By F. R. COWDEN, *Deputy.*

[Endorsed:] "Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, May 6, 1907. Jno. H. Dunn, Clerk. By ———, Deputy."

The witness' book of field-notes was thereupon produced, and he testified further as follows:

That is the original book of field-notes, and this paper (referring to a map) is the original plant of the Bon Voyage as surveyed November 11, 1903. There has since been added to that the plat of the Billie Fraction staked in 1905. The lines are correct. The Bon Voyage is correctly represented there on this map, according to its location on the ground, with the exception of the bearings as they are there on the plat, I could not get the correct bearings on it on account of the break in my instrument, because the needle of my compass being broken I could not make the bearings, but the angles are correct and I know that the distances given here are correct. My transit had fallen down the hill at York and the needle point of the compass, the jewel in the compass had been broken, the needle had been broken, and it would not work on account of the breaking of the jewel, so, I say, the bearing may not be exactly correct but the distances and the angles are correct. That transit is still broken and is here in town.

(Here follow maps marked pp. 70 & 71.)

72 Mr. BRUNER: We object to the introduction of the field-notes in evidence on the ground that it is incompetent, irrelevant and immaterial, being merely a personal memoranda of the witness from which he can refresh his recollection, but he cannot offer it as an exhibit, because of its self-serving character.

Which objection was overruled by the Court and exception duly noted, marked Defendants' Exhibit "E," and read to the jury as follows:

On cross-examination the witness testified as follows: In reading my notes to the jury I read the word- "representing shaft" instead of "prospecting shaft." I consider them equal and the same thing. I do not know why I made a mistake and called it the "representing shaft."

The first time I was ever on this claim was the latter part of September, or early part of October, 1901, I was again there on the 25th of December. When I first went out I took stakes from Dry Creek, five stakes, and took a shovel and a pan with me. I sunk a hole to the northwest corner, which was about two or three feet across, I guess. Just after I got through the tundra sod the hole was in the neighborhood of 3 or 4 feet deep, big enough for me to get the shovel in, to work with the shovel. The hole was about a foot in diameter, just about the size of a post hole. The ground was not frozen, except the top, possibly three inches of frost. I made a discovery, found colors. That hole would be about here (indicating.)

73 The witness thereupon marks a point on Exhibit "X" with the figures 22. I have not been out there since to discover if that hole is still there. The parties who did the representing for the year 1903 must have taken advantage of that hole because I ran my stake up on this line at that time, the stake where I set to indicate where they were to dig the representing shaft and they ran right up to my stake, they run their cut right over to my stake and that cut is still there. This hole in which I made my discovery at point 22 was inside the claim as originally staked, but after I moved the northwest corner in in 1903 when survey was made, it was just a few feet outside the claim as drawn in, about 20 feet outside of the lines of the claim as established in 1903, and they used that hole as a part of the assessment work for that year. The hole is not all obliterated. I had chosen a very prominent place. That northwest corner prior to November 11, 1903, was just about where I have indicated, where I dug my hole. The hole was right about at the northwest corner. I think it was to the left on my northwest corner, in a southerly direction. Assuming that this point was the corner where the original stake was prior to my drawing in the corner there, some 20 feet, that hole would be about in this corner, right in the crotch of the corner. I have no notes showing the exact number of feet I drew in the corner. The claim was too large, and I left the old northwest corner stake at its original place and drove a new stake where it now is. The old stake that was there is

74 the same stake that I put in September or October, 1901, and it remained in the same position all of that time and was still there on November 11, 1903. The claim was too large. I don't

think we drew in our stakes. We just put in new stakes. I did not take any notice of how much I drew in of my corner stakes at that time, but as I remember I drew in the northwest corner stake in the neighborhood of 20 feet. My original northwest corner was approximately in a direct line with my northern boundary line. I was out there marking and surveying. I knew there was some excess.

From the 1st of January, 1902, until November 11, 1903, I was never upon that land, and nobody during that time ever did anything in my behalf. I next visited the ground Nov. 11, 1903, after the first of January, 1902. When I was there in November 11, 1903, I found all the original stakes, in the same place in which I originally placed them, all marked with the name of the claim and scribed "B. V." They were marked "B. V." with the number. The same stake was also standing at the initial point.

At this point the witness was asked the following questions and made the following answers:

Q. How did you arrive on that day in November, how did you arrive at the course, South seventy degrees west?

A. I took a glass off my compass and I inserted in one end of the glass—stood the needle on the pivot, the needle as the jewel of the needle was broken and Mr. Suter had told me—

75 Q. Well, it don't make any difference what Mr. Suter said—

A. —and placed the needle on that pivot and allowed it — swing around—I allowed it to do that three times and then I took it out, or took it up and it stopped at the south—three times I allowed it to do that and I think I made a note in my note-book where it stopped so then I took that merely to give me the directions and in that way I got my directions for the plat.

Q. Was that magnetic or true north?

A. Well, that would have been magnetic if the needle had stopped at the true line.

Q. Well, you know whether it did or not?

A. No, I do not.

Q. So that south seventy degrees magnetic took you over to Sledge Island?

A. Well, as I say, that was what I was depending on for my bearings. I am depending on this line produced would strike the south peak of Sledge Island exactly.

Q. Do you mean to tell me now that you are claiming—that you are claiming that this map is correct in any degree?

A. I am going to claim that the map, what I have as to the distances there is some degree is quite correct.

Q. Well, now, answer me the questions. Would seventy degrees, south seventy degrees west magnetic, take you to the south peak of Sledge Island?

76 A. Well, starting at this point (indicating) if that was south forty degrees and forty minutes west, allowing for the same variation to be the same as I was getting it on the sand spit, which would be twenty-one degrees and twenty minutes east that line would be about in that same position.

Q. Well, don't you know that that would take you right to the center of Sledge Island instead of to the south peak?

A. Well, possibly the magnetic point of my needle as I say would not stop at any particular place, being broken I could not depend upon it.

Q. Well, you have testified now at least a dozen times to the needle of your compass being broken but I wish you would answer the question?

A. What is your question?

Q. Don't you know that that would take you right straight to the center of Sledge Island instead of to the south peak?

A. No, I do not, I did not tie to the courses I tied to angles.

Q. How did you arrive at your angle then?

A. Which angle?

Q. That angle of south seventy degrees west? Why have you put it down in that course, why have you put it down south seventy degrees west?

A. Merely for completing the map, you have got to—if you cannot get your bearing you have got to find if you cannot take your true meridian—if you cannot get one meridian you have got to take another to complete your courses and your angles.

77 Q. Then you do not say that this map is correct?

A. I claim that the distances and angles are correct, I never have made any claim that the courses are correct on that map, no, sir. The testimony I have just given all have reference to my survey of the claim on November 11, 1903.

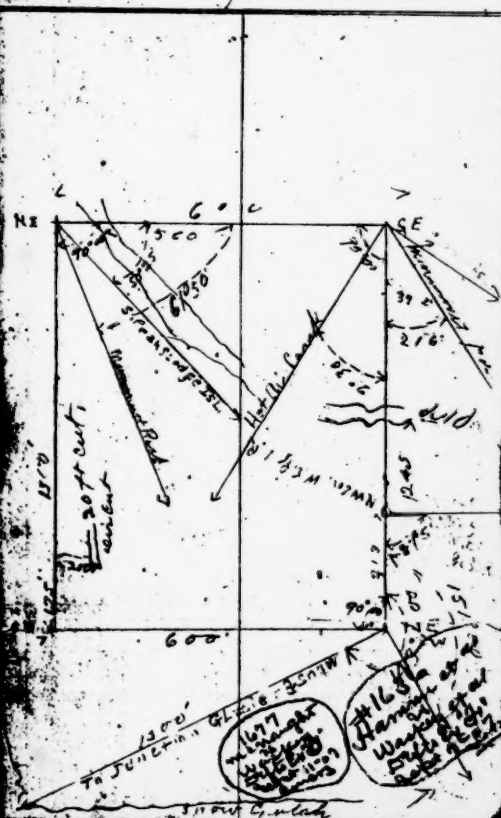
The witness then continued to testify: I staked the Billie Fraction during the summer of 1905. That was not the time I made my computation of the courses and distances. I did not put any courses or distances on this plat of the Billie Fraction. There is none given. There are two sets of field-notes on that page, one pertaining to the Billie Fraction made in 1905, and the other pertaining to the Bon Voyage, which I made in November, 1903. I made all of those notes on that page pertaining to the "Bon Voyage" on November 11, 1903. The reason why I happened to make those notes of the Billie Fraction on the same page was this: We was going out to the claim and I picked up this book of field-notes and took it with me so as to go over all our corners and to see that they were all properly marked, and Andy and I were going to visit the claim and I just merely slipped this note-book in my pocket and took the transit along, and Andy said that nobody seemed to stake this ground from which the Billie was staked and which we had located or I had located the Bon Voyage originally and where we had drawn in our lines to make it exactly twenty acres, some twenty feet or so, and it just

78 seemed to be standing there vacant, and I said yes, and we staked this fraction in here and I just took my same field-notes where I had made them when I made the survey in 1903 of the Bon Voyage and I just put my notes of the Billie Fraction on this same page that I had used to take this map off.

The notes of 1903 were made first. The reason why the first note on this page is where I tied to the Billie Fraction is because all sur-

Defendants' Exhibit "F."

Oct 30th 1909 24th Bureau Zoon
N. W. Com. Co. Oct 22
Republic Quartz Claim



Defendants' Exhibit "G."

no. 84.
Macken
H
Stammes } p. 80

Handwritten text in a circular stamp, likely a library or archival mark, containing the words "BIBLIOTHECA" and "MUSEUM".

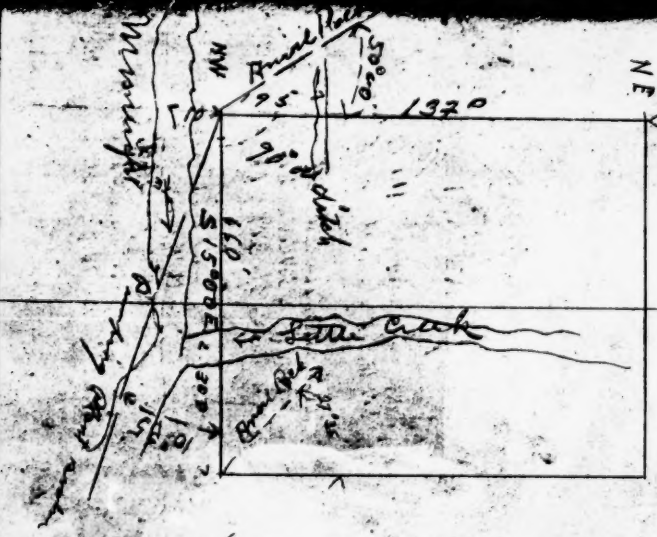
N 76° E, all corners cut marked with
 6" x 8" stakes with nails to secure
 the points. Corner, N.E. 6.5 1/2 -
 N.W. 8.5 1/2 - S.E. 1.5 1/2 x S.W. 8.5 1/2
 Replanting work being a ditch
 75 ft. from N.W. 8.5 1/2 for the year
 1903.

[illegible]

Nov 13th 1908
5 1/2 Pitt. Coal Co.
20 new Fractures

(Cold and Windy)

None Aucto PP



veyors always start at the bottom of his page and work up. This is all my handwriting. The age is not the same. Mr. Zimmer was my draughtsman in 1905 and I remember taking these notes just as they are about the Billie Fraction, just the two or three—or a couple of entries, two or three distances, and I remember computing the angles and measuring the distances and putting in this Billie Fraction right in on the same plat or map as I have the Bon Voyage lines.

At the time we made the survey there was no representing or prospect shaft there. I put in the stake, marked the place. We started the shaft that day. I tied all my corbers to that stake, the representing stake.

Upon redirect examination, the witness testified (referring to his field-book) : The page preceding the "Bon Voyage" survey were notes of a survey made by me October 20, 1903, and the one succeeding was the 20th of November, 1903, being the Republican Quartz Claim,

5½ Little, 20 acre fraction. Said pages were thereupon introduced in evidence, to which admission of evidence plaintiffs objected upon the ground that the same was irrelevant, immaterial, incompetent, hearsay, self-serving declarations of a party in interest, marked Exhibits "F" and "G," and were as follows:

(Here follow diagrams marked pp. 79 & 80.)

81 CHAS. D. TAFT, produced by the defendants, being duly sworn, testified:

My name is Charles D. Taft. I live in Nome at the present time. I came from Seattle. I was a plumber there. I came up here to testify in this case. Mr. Whittren procured me to come up. He paid my transportation. I have been in Nome prior to this last time. That was in 1903 and '4. I arrived here the 10th of July, 1903, from Seattle, and stop with Mr. F. M. Lang on the spit. He is here now. I know the "Bon Voyage" Claim. The first time I saw it was November 11, 1903. I went with Mr. Lang and Mr. Whittren to help survey the claim. We ran the lines. I carried the chain; I took the lead in carrying the chain, or it was a steel tape which we used at the time; just the same thing. Mr. Lang also went out with us on November 11th; no one else, except Lang and Whittren. We started to survey from the northeast corner.

At this point the witness was requested to examine the map, Defendants' Exhibit "X," and continuing testified:

We began the survey at this point (indicating the northeast corner), the point marked 2. From there we went down to the stake marked 5, Mr. Lang and myself. From there we went to the northwest corner and found a stake at that point, a driftwood stake, shaved off and carved a B. V. on it. I don't remember whether anything else was carved on it or not. The stake is about 2 feet above
82 the ground. We did not place a-y other stake there. If my memory serves me, we moved that stake in about twenty feet; that is, we set a new stake in about twenty feet from the old stake. The new stake was a 2 x 2. We brought it from town. It is marked to designate it the corner of the Bon Voyage, cut in. At the northeasterly corner of the Bon Voyage we found a stake, a driftwood stake, that had been shaved off. There was written on it the name of Max Roth by Otto Halla, Agent. There was a plain "B" and a portion of a "V" on the stake, partially obliterated with the knife. The "B-V." had been carved in. The stake was taken down and brought to town by Mr. Whittren; that is, he took it away from the claim on that day and I suppose he took it to town. I remained on the claim after the others left. We placed a stake at the northeast corner, and, as I remember, there was another stake there. The stake we placed was a 2 x 2, carved "N. E. B. V." From the northwest corner we went back to the point 2 northeast corner, and chained the No. 3 southeast corner. Mr. Long and Mr. Whittren were with me. We found a stake there, a "B. V." stake, about 2 feet high, 2 inches in diameter, a round stake. It had "B. V." carved into it on one side. We put up one of the 2 x 2 stakes at this point, carved "S. E. B. V." From there we went to the southwest corner. We had some difficulty in finding that stake, but found it was marked
83 "B. V.," in the same manner as the others. We moved that stake in; that is, we set another stake. We planted that stake about 50 feet from the other stake, in from the old stake. The old stakes were left standing. After having completed the survey on the 11th of November, 1903, we finished up at the shaft, at

the stake where I sank the shaft. A stake was placed there. I know the old wagon trail, the road to Tripple, it runs about 50 feet from the shaft, quartering over the hill. Mr. Whittren placed a stake there. He ran angles from the two stakes, the northeast and the northwest corners.

After having finished the survey, I stayed on the claim and went to work. Mr. Lang and Mr. Whittren went down to the Williams boys' claims on Newton Gulch, and I commenced to work on the shaft. I placed some mounds around the corner stakes, picked it up. Had a pick and shovel. I have been on the Bon Voyage Claim since that time. Was there in 1904; was passing by there in September, just passing by the claim, and stopped there a little time. There was nobody there. I saw this shaft stake. When I did the work I left a good monument around the stake, and it was setting close to the edge of the shaft, and the dirt in the spring and summer had thawed away from the stake and the stake was about to fall in; so I moved the stake back a little and placed a new monument and set it in place. I passed the northeast corner several times, Corner No. 2. It had not been changed that I noticed. I would have noticed it if it

84 had been changed. I was doing some work in the vicinity on the Roosevelt and Fox Creek. I was working on the Roosevelt for Mrs. McNaught. That is the claim marked there (indicating on the map). I have been on the claim since then. I went out there on the 4th of August, and I went out there on the 22d of August of this year. I made an examination of the stakes, marking the corners of the claim. To the best of my knowledge, the stakes are in the same place that they were placed at the time of the survey in 1903. I do not think they could have been moved any appreciable distance. I have no interest in the lawsuit, none whatever.

On cross-examination the witness testified as follows:

I got free transportation here from Seattle to testify in this case and was to have \$5.00 a day and expenses while I was in Nome. That's as far as my interest goes.

Since I have been here I have been living with Mr. Lang, down on Front Street.

I have been doing no work on the Bon Voyage this year. I arrived on the 11th of June. Since I came here I have been up north with Mr. Lange; was there 23 days with Mr. Lange on his property in the Kougarok, 23 days representing his claims.

At the time we made the survey there was no hole at the point marked as representing shaft. I dug the hole afterwards.

85 F. M. LANGE, a witness produced on behalf of the defendants, being first duly sworn, testified as follows:

I live on Front Street in Nome. I know C. D. Taft. Have known him since 1902. In 1903 he was living with me in Nome on the Sand Spit. He was working for me.

I know where the "Bon Voyage" Claim is. I first saw it in the first part of November, 1903. We went to survey it on that day.

Mr. Whittren, Taft and myself surveyed the claim. I helped measure the claim; helped chain it. Carried the stakes and tools. The stakes were 2x2. They had markings on, cut in with a surveyor's instrument, marked "B. V.," with the corners "N. E." and "N. W." We had a pick and shovel and surveyor's instruments. We started to survey the "Bon Voyage" Claim at the northeast corner.

The testimony of the witness Lange in reference to surveying the claim was in substance the same as that of the witness Taft.

ARTHUR GIBSON, a witness produced on behalf of the defendants, being first duly sworn, testified as follows:

I am acquainted with the "Bon Voyage" and "Golden Bull" Mining Claims, also the "Golden Calf" and "Roosevelt." I surveyed them March 12, 13, and 14, 1907. I made this plat, Defendants' Exhibit "X," on the wall. This plat is a correct
86 plat of the claims as I found them on the ground at that time.

I found that there was a trifle over 20 acres in the "Bon Voyage" Claim, forty-eight one-thousandths. I set now stakes, properly marked, three feet and twenty-one inches northerly from the southeast and southwest corner stakes, in order to reduce the claim to exactly 20 acres. I did this at the direction of Mr. Orton, Attorney for the defendants.

It was admitted that the witness Arthur Gibson was a qualified surveyor and engineer.

Dr. J. J. CHAMBERS, a witness produced on behalf of the defendants, being first duly sworn, testified in substance that he was on the said "Bon Voyage" Claim about the 25th of August, 1902; saw the initial stake with the location notice in it, and the northwest corner stake. Did not see any other stakes at that time; that he took the notice out and read it; that he had been on the claim recently, within the last six months; had been living there practically ever since the 5th day of December; that he knew where the upper stakes of the "Bon Voyage" Claim are at the present time and they look to be in just the same place as he saw them in August, 1902.

J. POTTER WHITTREN, recalled on behalf of the defendants, testified further as follows:

I made a discovery of gold upon the "Bon Voyage" Claim in the year 1903; that was within the boundaries of the "Bon Voyage" as they now stand; this was December, 1903.

87 Being further cross-examined, the witness testified as follows:

It was about the middle of December the discovery was made, 354 feet from the northwest corner; it was at the representing shaft for 1903. The occasion of my being out there was to pass upon the work I was to pay for. I took the dirt off the surface of the ground where it had been thrown out of the shaft. I had made a discovery prior to that time. I went out there on that day partially to make a discovery. I was not there while the work was being done. I borrowed a sack on that day from Phil Williams and put the dirt in that and brought it to town and thawed it out. Phil Williams

was representing some ground for George James on Newton Gulch. In December, 1903, I was a Deputy Mineral Surveyor. The date of my appointment is February, 1903. I was not a Deputy Mineral Surveyor on December 22d, 1902.

ANDREW EADIE, a witness on behalf of the defendants, being first duly sworn, testifies as follows:

I am one of the defendants. I have been in Nome since 1900, engaged in mining. I know where the "Bon Voyage" Claim is. I first saw it in October, 1904. I was on the ground at that time, early in October. I made an examination of the markings on the ground at that time. The first time I went out to the "Bon Voyage"

88 I came up Dry Creek on the old wagon road running through this way (indicating on Defendants' Exhibit "X").

About 50 feet west of the wagon road there was a stake there. That was the first stake I saw of the "Bon Voyage." There was some writing on it. It was the representing stake. I next saw the northeast corner at point 2 on Defendants' Exhibit "X." It was a 2x2, with a tack on top of it. It had the letters carved "B. V." on it and northeast corner cut in with a knife. The stake was planted in the ground and a small mound around it. There were several stakes at that corner. I also saw a stake at the point 5 on Defendants' Exhibit "X," 2x2, similar to the first one, with the letters "N. W. B. V." carved in it. I saw also the stake at the northeast corner. It was in a small mound. I also saw the southwest corner. It was marked "S. W. B. V.," cut in with a knife, planted in the ground similar to the others. I also saw the southeast corner at the point 3 on Defendants' Exhibit "X," the same kind of a stake, marked "S. E. B. V.," carved in. The stake was planted in a small mound.

I am a half owner in the "Bon Voyage." At this point a deed was admitted in evidence, marked Defendants' Exhibit "H," and is in words and figures as follows:

DEFENDANTS' EXHIBIT "H."

Know all men by these presents: That J. Potter Whittren, of Nome, Alaska, the party of the first part, for and in consideration of the sum of one-dollar, and other valuable considerations, 89 lawful money of the United States, to him in hand paid, by Andrew Eadie, the party of the second part, the receipt of which is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns an undivided one-half ($\frac{1}{2}$) interest in the following described placer mining ground, situate in Cape Nome Recording District, District of Alaska, and more particularly described as follows, to wit:

One certain Bench Claim known as the "Bon Voyage" situated about 1,500 feet in a southerly direction from No. 3 Creek Claim on Newton Gulch, staked and recorded in 1902, surveyed and

survey stakes with name and corners carved on same, placed in tundra mounds in the fall of 1903.

Said bench containing twenty acres of placer mining ground.

To have and to hold the same to the said party of the second part, his executors, administrators, and assigns, forever. And I do for his heirs, executors, administrators, covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of the said property, hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

90 In witness whereof I have hereunto set my hand and seal the 24th day of Sept., A. D. 1905.

J. POTTER WHITTREN.

Witness:-

L. A. FEIKE.

J. W. ALBRIGHT.

UNITED STATES OF AMERICA,
District of Alaska, ss:

This is to certify that on this 24th day of Sept., A. D. 1905, before me, J. W. Albright, a Notary Public in and for the District of Alaska, personally came J. Potter Whittren, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal, the day and year in this certificate first above written.

[SEAL.]

J. W. ALBRIGHT,
Notary Public.

[Endorsed:] "Filed for record at request of Andrew Eadie Oct. 9, 1905, at 05 minutes past 10 o'clock and recorded in Book 154, page 302, Records Cape Nome Recording District, Alaska. T. M. Reed, Recorder. By W. W. Sale, Deputy. 4 Folios 3 Ind. \$2.85."

[Endorsed:] "Filed in the office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Alaska. Aug. 28, 1907. Jno. H. Dunn, Clerk. By ———, Deputy."

91 The witness, continuing, testified: I have been on the claim since that time, mining upon it. I am familiar with the markings on the claim as they now exist. The corner stakes are now in exactly the same place as when I first saw them. We have been working the claim last winter and last summer, Mr. Waskey and myself.

[*Stipulation Admitting that Defendant was a Lessee, etc.*]

At this point the following proceedings were had:

"Mr. FINK: It is stipulated between counsel for plaintiffs and defendants in this action, that in lieu of proof it is admitted that the defendant was a lessee under and by virtue of the terms of the leases attached to his answer; and it is admitted also that Mr. Eadie is working under a lease as set forth in the respective answers.

The COURT: Let the record so show.

Mr. COCHRAN: You will admit, I presume, that Mr. Eadie is also a lessee on a one-half interest in the mine from J. Potter Whittren.

Mr. BRUNER: If you say he is.

Mr. COCHRAN: Together with Waskey.

Mr. BRUNER: I understand that; there is no necessity of proving that.

The foregoing is all the testimony introduced at the trial of the above-entitled action.

[*Motion for a Verdict in Favor of Plaintiffs.*]

Thereupon the plaintiffs moved the Court to instruct the jury to find a verdict in favor of the plaintiffs for the following reasons:

92 "First. That the testimony as now adduced before the Court and to the jury shows that on the 1st day of January, 1904, the lands included within the Golden Bull location was open and unappropriated public domain of the United States and subject to location;

Second. Because the defendants have not established any defense to the plaintiffs' complaint or have not answered in any way the testimony submitted by the plaintiff- in the case.

(Jury withdrawn by order of the Court.)

Mr. REED (continuing:) The testimony submitted by the defendants shows that the discovery made by Mr. J. Potter Whittren in the year 1901 as marked upon the map by the witness himself was at the point #22; that on November 11th, 1903, the time when he made the survey of the claim and drew in the lines of the Bon Voyage claim it left the point where a discovery was made outside and not within the lines of the said Bon Voyage claim, and the defendants themselves, recognizing that it was necessary that a discovery of gold be made within the lines of the location as amended, put Mr. Whittren back on the witness-stand, just before they closed their case on Saturday evening, and he testified that on December 11th, 1903, he again went to the mining claim in question and made a discovery at the point designated as the prospect shaft and within the lines of the said Bon Voyage claim.

93 "The testimony also shows that at the time of said discovery of gold Mr. J. Potter Whittren was a Deputy Mineral Surveyor of the United States, and therefore under the laws of the United States incapacitated to make a mining location."

[*Decision on Motion for a Verdict for Plaintiff-, etc.*]

Said motion having been argued and submitted, the Court announced his decision as follows:

"The COURT: I have given as much time and attention to this question as I could well within the time I had at my disposal; it is an important question and in some respects I regret I could not have given it more time. We take the declarations and decisions of the department of the interior as entirely binding on this Court, and in constituting the law as they have, that a Deputy Mineral Surveyor is within the prohibition of this Statute, and have relaxed the rule of strict construction, and brought themselves within the exception to the rule. In other words, they construe it with reference to the manifest intent of the legislators, and we apply the same rule to it, and following the Department of the Interior, we see no reason why this should not be the law, because the deputy mineral surveyor-, as has been declared in numerous decisions, are subject to the directions of the Commissioner of the Land Office; they are therefore officers in the General Land Office, or come properly within the designation, officers and employees in the general land office; that doesn't mean, I think, in the general land office at Washington; it means all the various officers under the control of the Commissioner of the land office.

94 So it being the law, as I understand it, that a deputy mineral surveyor is within this prohibition, and may not locate land. That he is in fact a purchaser of land when he locates land, and I think a purchaser of land is one who acquires land in any other manner than by descent. All lawyers, I think, will agree that that is the proper definition and classification. I see, of course, that there is a penalty attached by Section, and that is removal from office, but I don't think that the fact that there is a penalty—that that special penalty is affixed to the office—should trouble us when we come to construe the Statute—construe the general prohibitory clauses of this section. So in view of these various considerations and in view of the fact that Mr. Lindley has so decided that a purchaser such as we have described, we have authority for that * * * But here is prohibitory section of the statute, which further than that, as we view it, makes the location—as I have construed it—the purchase of public lands by a United States deputy mineral surveyor absolutely void. I am constrained to grant the motion to direct a verdict in this case. The motion is now granted.

Mr. ORTON: Please note an exception to the ruling of the Court on behalf of all the defendants.

The COURT: I therefore shall direct a verdict in favor of the plaintiffs in this case.

95 Mr. BRUNER: We have prepared a form of verdict for the final issue of the case, and we disclaimed any other damages than nominal damages in the opening of the case, the law requiring nominal damages, and ask the Court to instruct the jury on that point."

To which ruling each of the defendants then and there excepted.

[Instructions of the Court to Jury.]

Thereupon the Court read his instructions, in writing, to the jury, in words and figures as follows:

"GENTLEMEN OF THE JURY: The plaintiffs, at the close of the evidence, offered by the defendants in this case, have made a motion addressed to the Court whereby the Court is asked to direct a verdict to be rendered by the jury in favor of the plaintiffs, upon two grounds, namely:

First. That the location of the Bon Voyage Claim, made in January, 1902, was invalid because no discovery of gold has been proved to have been made within the limits of the claim as surveyed on November 11th, 1903, since such survey.

Second. That the proofs showing that the locator of the Bon Voyage Mining location, Mr. Whittren, was at the time of the survey in November, and of the subsequent discovery of gold by him on December 13th, 1903, a Deputy Mineral Surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee Eadie to the Bon Voyage, resting, as the title of both do, upon the location of December 13th, 1903, is invalid.

96 This motion was argued by the counsel on both sides of the case and the Court has given careful consideration to the arguments advanced and authorities cited, and is now of the opinion that the motion should be granted, both grounds being sound and valid in the Court's opinion.

So far as the lessees Waskey and Eadie are concerned, their rights as lessees, being derived from Whittren and Eadie, alleged owners, the verdict which you shall render will be against them also as lessees.

The plaintiffs have offered no proof of damages incurred by them by the wrongful withholding of the possession of the claim in controversy from the plaintiffs, and have waived the right to recover any damages above mere nominal damages. Mere nominal damages, I instruct you, is some small amount of money, as for example, one cent, or any other sum not exceeding one dollar.

I submit a form of verdict with amount of damages left blank. You will determine upon the amount and have your foreman insert the amount in the blank space left in the verdict for the insertion of the proper amount or sum.

In accordance with the conclusions reached by the Court, you are now directed to render a verdict for the plaintiffs for the land in controversy and for nominal damages, as I have just defined nominal damages.

You need not retire from your seats to make up your verdict.

97 [Exceptions to the Instructions of the Court to Jury.]

Thereupon, before the Jury retired to deliberate upon their verdict, the defendants and each of them separately took the following exceptions to the foregoing instructions of the Court:

"First Exception. The said defendants except to that part of the Court's instructions to the jury which reads as follows: 'That the location of the Bon Voyage Claim, made in January, 1902, was invalid because no discovery of gold has been proved to have been made within the limits of the claim as surveyed on November 11th, 1903, since *sunce* survey.'

Second Exception. The said defendants except to that part of the Court's instructions to the jury, which reads as follows: 'That the proofs showing that the locator of the Bon Voyage Mining location, Mr. Whittren, was at *the* of the survey in November, and of the subsequent discovery of gold by him on December 13th, 1903, a Deputy Mineral Surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee Eadie to the Bon Voyage, resting, as the titles of both do, upon the location of December 13th, 1903, is invalid.'

Third Exception. The said defendants except to that part of the Court's instructions to the jury, which reads as follows: 'So far as the lessees Waskey and Eadie are concerned, their rights, as
98 lessees, being derived from Whittren and Eadie, alleged owners, the verdict which you shall render will be against them also as lessees.'

Fourth Exception. The said defendants except to that part of the Court's instructions to the jury which reads as follows: 'In accordance with the conclusions reached by the Court, you are now directed to render a verdict for the plaintiffs for the land in controversy and for nominal damages, as I have just defined nominal damages.'

Fifth Exception. The said defendants except to that part of the instructions of the Court to the jury wherein the Court directed the jury to render a verdict for plaintiffs for the land in controversy."

Thereupon, the jury under the instructions of the Court, returned a verdict in favor of the plaintiffs as directed.

[Prayer for Settlement, etc., of Bill of Exceptions.]

And, to make the foregoing matters of record, the said defendants present this Bill of Exceptions and pray that the same may be settled and allowed.

ALBERT FINK,
IRA D. ORTON,
O. D. COCHRAN,
Attorneys for Defendants.

[*Order Settling, etc., Bill of Exceptions.*]

The foregoing bill of exceptions having been served, filed and presented for settlement within the time provided by law, and extensions thereof made by orders duly entered of record, and the settlement thereof having been regularly continued to the present
99 term of court and to this day, and said bill being now found correct, the same is hereby settled and allowed.

Done at Nome, Alaska, in open court this 20th day of January, 1908.

ALFRED S. MOORE,
Judge District Court, District of Alaska,
Second Division.

O. K.

J. ALLISON BRUNER,
Of Plffs' Att'ys.

[Endorsed:] # 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff-, vs. Frank H. Waskey et al., Defendant-. Defendants' Proposed Bill of Exceptions. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome, Dec. 16, 1907. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Defendants. McB. Re-filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 20, 1908. Jni. H. Dunn, Clerk. By ———, Deputy.

In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER et al., Plaintiffs,
vs.
FRANK H. WASKEY et al., Defendants.

100

Assignment of Errors.

Come now the defendants in the above-entitled action and assign the following errors committed by the Court on the trial of the above-entitled action, upon which they intend to and do rely upon the writ of error to the United States Circuit Court of Appeals for the Ninth Circuit:

I.

The Court erred in permitting the witness Halla to testify in answer to the question propounded by counsel for plaintiffs that he had told B. Schwartz that he (Halla) had made a discovery of gold on the premises in dispute in the year 1902. The question, objection, ruling of the Court and answer of the witness is as follows:

"Q. You was asked with regard to this talk that you had with Mr. Schwartz going out there, in regard to that, the conversation in re-

gard to that, was there anything said with regard to the discovery of gold made upon the claim?

Mr. ORTON: Objected to as leading, hearsay, immaterial and incompetent.

Q. As to whether there had been any communication of the fact by Halla to Schwartz that he had made a discovery of gold?

Mr. ORTON: Objected to as immaterial, irrelevant, *immaterial*, hearsay and leading.

The COURT: Overruled.

Mr. ORTON: Exception taken by the defendants.

A. I told Schwartz that I had made a discovery of gold in 1902."

101

II.

The Court erred in granting the motion of the plaintiffs to direct a verdict in favor of the plaintiffs.

III.

The Court erred in holding that the location of the "Bon Voyage" Claim in January, 1902, was invalid, because no discovery of gold had been proven to have been made within the limits of the claim as surveyed on November 11, 1903.

IV.

The Court erred in holding that because of the fact that Mr. Whittren, the locator of the "Bon Voyage" Claim, was a United States Deputy Mineral Surveyor in November, 1903, he could not thereafter make a valid discovery of gold on the "Bon Voyage," which had been located by him in January, 1902.

V.

The Court erred in holding that a valid location of a placer claim cannot be made by a Deputy Mineral Surveyor, and in instructing the jury to find a verdict in favor of the plaintiffs for that reason.

VI.

The Court erred in instructing the jury as follows: "That the proofs showing that the locator of the 'Bon Voyage' mining location, Mr. Whittren, was at the time of the survey in November, and of the subsequent discovery of gold by him on December 13th, 1903, a Deputy Mineral Surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee Eadie to the Bon Voyage, resting, as the titles of both do, upon the location of December 13th, 1903, is invalid."

102

VII.

The Court erred in instructing the jury as follows: "So far as the lessees Waskey and Eadie are concerned, their rights, as lessees, being derived from Whittren and Eadie, alleged owners, the verdict which you shall render will be against them also as lessees."

VIII.

The Court erred in instruction the jury as follows: "In accordance with the conclusions reached by the Court, you are now directed to render a verdict for the plaintiffs for the land in controversy and for nominal damages, as I have just defined nominal damages."

IX.

The Court erred in instructing the jury to render a verdict for plaintiffs for the land in controversy.

Wherefore, defendants pray that the said judgment be reversed and that they be restored to all things they have lost thereby.

IRA D. ORTON,
ALBERT FINK,
O. D. COCHRAN,
F. E. FULLER, AND
Attorneys for Defendants.

[Endorsed:] # 1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs. Frank H. Waskey et al., Defendant. Assignment of Errors. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 25, 1908. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Defendants.

In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,
vs.
FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN
and ANDREW EADIE, Defendants.

Petition for Writ of Error.

The defendants in the above-entitled action, considering themselves aggrieved by the verdict of the jury and judgment entered thereon, come now by Messrs. Ira D. Orton, Albert Fink and O. D. Cochran, their attorneys, and petition the Court to allow a Writ of Error to review said Judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and further pray that an order be made fixing the amount of security to be given by the defendants in error.

ALBERT FINK,
IRA D. ORTON,
F. E. FULLER,
O. D. COCHRAN,
Attorneys for Defendants.

104 It is hereby ordered, that the foregoing Writ of Error be granted, petitioners to give a bond in the sum of Ten Thousand Dollars, to operate as a supersedeas.

Dated, January 25, 1908.

ALFRED S. MOORE,
*Judge District Court, District of
Alaska, Second Division.*

[Endorsed:] #1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs. Frank H. Waskey, et al., Defendant. Petition and Order for Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 25, 1908. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Defendants.

105 In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,

vs.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN
and ANDREW EADIE, Defendants.

Bond on Writ of Error.

Know all men by these presents: That we, Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, as principals, and T. M. Gibson and Art. Gibson, and J. Berger, as sureties, are held and firmly bound unto Joseph Hammer, Otto Halla and B. Schwarz, plaintiffs in the above-entitled action, in the sum of ten thousand dollars, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators and assigns, firmly by these presents.

Sealed with our seals and dated this 25th day of January, 1908.

Whereas, lately at a session of the above-entitled Court, in an action pending in said Court between Joseph Hammer, Otto Halla and B. Schwarz, plaintiffs, and Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, defendants, a judgment

106 was, on the 16th day of November, 1907, rendered and entered in favor of said plaintiffs and against said defendants, and said defendants having obtained from the said District Court an order allowing a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit to review said judgment, and a Citation directed to said Joseph Hammer, Otto Halla and B. Schwarz is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California,

Now, therefore, the condition of the above obligation is such, that if the said Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, shall prosecute their said Writ of Error to effect and answer all damages and costs, if they shall fail to make

their plea good, then this obligation shall be void; otherwise, it shall remain in full force and effect.

By FRANK H. WASKEY, [SEAL.]
IRA D. ORTON,

Att'y in Fact.

J. M. CRABTREE. [SEAL.]

T. M. GIBSON. [SEAL.]

ANDREW EADIE, [SEAL.]

By O. D. COCHRAN,
His Att'y in Fact.

J. BERGER. [SEAL.]

ART. GIBSON. [SEAL.]

J. POTTER WHITTREN. [SEAL.]

107 UNITED STATES OF AMERICA,
District of Alaska, ss:

Art. Gibson, T. M. Gibson and J. Berger, being first duly sworn, each for himself, deposes and says: That he is one of the sureties on the foregoing bond; that he is worth the sum of ten thousand dollars, over and above all debts and liabilities and exclusive of property exempt from execution.

ART. GIBSON.

T. M. GIBSON.

J. BERGER.

Subscribed and sworn to before me, this 25th day of January, 1908.

[COURT SEAL.]

ANGUS McBRIDE.
*Deputy Clerk District Court,
Alaska, Second Division.*

The foregoing bond on Writ of Error is hereby approved this 25th day of January, 1908, in open court at Nome, Alaska.

ALFRED S. MOORE,
*Judge District Court, District of
Alaska, Second Division.*

[Endorsed:] #1636. In the District Court for the District of Alaska, Second Division. Joseph Hammer et al., plaintiff-, vs. Frank H. Waskey et al., defendant-. Bond on Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 25, 1908. Jno. H. Dunn, Clerk. By

108 ———, Deputy. Ira D. Orton, Attorney for Defendants.

In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,
vs.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN
and ANDREW EADIE, Defendants.

Writ of Error [Lodged Copy].

The President of the United States of America to the Honorable
the Judge of the United States District Court for the District of
Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of
the judgment of a plea which is in the said District Court before you,
between Joseph Hammer, Otto Halla and B. Schwarz, plaintiffs, and
Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and An-
drew Eadie, defendants, a manifest error hath happened, to the great
damage of Frank H. Waskey, Joseph M. Crabtree, J. Potter Whitt-
ren and Andrew Eadie, plaintiffs in error, as by their complaint
appears,

We, being willing that error, if any hath been, should be
109 duly corrected and full and speedy justice be done to the par-
ties aforesaid in this behalf, do command you, if judgment
be therein given, that then under your seal, distinctly and
openly, you send the record and proceedings aforesaid, and all things
concerning the same, to the Justice of the United States Circuit Court
of Appeals for the Ninth Circuit, in the City and County of San
Francisco, in the State of California, together with this writ, so as to
have the same at said place in said Circuit on the 22d day of Feb-
ruary, 1908, and that the records and proceedings aforesaid being
inspected, the said Circuit Court of Appeals may cause further to be
done therein to correct these errors what of right and according to
the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the
Supreme Court of the United States, this 25th day of January,
1908.

Attest my hand and seal of the United States District Court for
the District of Alaska, Second Division, at the Clerk's Office, at
Nome, Alaska, this 25th day of January, 1908.

[SEAL.]

JNO. H. DUNN,
*Clerk of the United States District Court
for the District of Alaska, Second Division,*
By ANGUS McBRIDE,
Deputy Clerk.

Allowed this 25th day of January, 1908.

ALFRED S. MOORE,
*Judge of the United States District Court
for the District of Alaska, Second Division.*

110 The foregoing copy of writ of error lodged in my office for defendant- in error this 25th day of January, 1908.

JNO. H. DUNN,
Clerk District Court, District of
Alaska, Second Division.

[Endorsed:] #1636. In the District Court for the District of Alaska, Second Division. Jose7/8h Hammer et al., Plaintiff-, vs. Frank H. Waskey, et al., Defendant-. Lodged Copy Writ of Error. Filed in the Office of the Clerk of the Dist. Court of Alaska, Second Division, at Nome. Jan. 25, 1908. Jno. H. Dunn, Clerk. By ———, Deputy. Ira D. Orton, Attorney for Defendants.

In the District Court for the District of Alaska, Second Division.

No. 1636.

JOSEPH HAMMER, B. SC-WARTZ, and OTTO HALLA, Plaintiffs,
vs.
FRANK H. WASKEY, J. CRABTREE, J. POTTER WHITTEN, and AN-
DREW EADIE, Defendants.

Clerk's Certificate [To Transcript of Record].

I, John H. Dunn, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 109, both inclusive, are a true and exact transcript
111 of the Complaint, Summons, Demurrer of Defendants F. H. Waskey and J. M. Crabtree to Complaint, Demurrer of Defendants J. Potter Whittren and Andrew Eadie to Complaint, Minutes of Court of January 12, 1907 (demurrers overruled), Answer of Defendants J. Potter Whittren and Andrew Eadie to Complaint, Minutes of Court of February 16, 1907, (J. J. Chambers made party defendant), Answer of Defendants F. H. Waskey and J. Crabtree to Complaint, Reply to Answer of F. H. Waskey and J. Crabtree, Reply to Answer of J. Potter Whittren and Andrew Eadie, Verdict, Motion for New Trial, Minutes of Court of November 6, 1907 (Motion for New Trial overruled), Judgment, Bill of Exceptions, Assignment of Errors, Petition for Writ of Error and Order Allowing Same, Bond on Writ of Error, and Lodged Copy Writ of Error, in the case of Joseph Hammer et al., Plaintiffs, vs. Frank H. Waskey et al., Defendants, No. 1636 this court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; also certify that said transcript contains all the pleadings in the above-entitled case; and that the Original Writ of Error and Original Citation in said case are attached to this transcript.

Cost of transcript \$33.25, paid by Ira D. Orton, of attorneys for defendants.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 8th day of February, A. D. 1908.

[SEAL.]

JNO. H. DUNN, Clerk.

112 In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,

vs.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN
and ANDREW EADIE, Defendants.

Writ of Error [Original].

The President of the United States of America to the Honorable the Judge of the United States District Court for the District of Alaska, Second Division, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between Joseph Hammer, Otto Halla and B. Schwarz, plaintiffs, and Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, defendants, a manifest error hath happened, to the great damage of Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, plaintiffs in error, as by their complaint appears,—

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein

113 given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, and all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, in the State of California, together with this Writ, so as to have the same at said place in said Circuit, on the 22 day of February, 1908, and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct these errors what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25 day of January, 1908.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's Office, at Nome, Alaska, this 25 day of January, 1908.

[SEAL.]

JNO. H. DUNN,

*Clerk of the United States District Court for the
District of Alaska, Second Division.*

By ANGUS McBRIDE,

Deputy Clerk.

Allowed this 25th day of January, 1908.

ALFRED S. MOORE,

*Judge of the United States District Court for the
District of Alaska, Second Division.*

[Endorsed:] #1636. In the District Court for the District
 114 of Alaska, Second Division. Joseph Hammer et al., Plaintiff,
 vs. Frank H. Waskey et al., Defendant. Writ of Error.
 Ira D. Orton, Attorney for Defendants.

In the District Court, District of Alaska, Second Division.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Plaintiffs,
 vs.
 FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN,
 and ANDREW EADIE, Defendants.

Citation [Original].

The President of the United States of America to Joseph Hammer,
 Otto Halla, and B. Schwarz, Greeting:

You are hereby cited and admonished to be and appear at the
 United States Circuit Court of Appeals, for the Ninth Circuit, to be
 holden at the city and county of San Francisco, in the State of Cali-
 fornia, on the 22 day of February, 1908, pursuant to a Writ of
 Error filed in the Clerk's office of the United States District Court
 for the District of Alaska, Second Division, wherein Frank H.
 Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie
 are plaintiffs in error, and you are defendants in error, to show cause,
 if any there be, why judgment in the said Writ of Error men-
 115 tioned should not be corrected, and speedy justice should not
 be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the
 Supreme Court of the United States of America, this 25th day of
 January, 1908, and of the Independence of the United States the one
 hundred and thirty-second.

ALFRED S. MOORE,
Judge District Court, District of Alaska, Second Division.

Attest:
 [SEAL.]

JNO. H. DUNN, *Clerk,*
 By ANGUS McBRIDE,
Deputy Clerk.

Service of the foregoing citation admitted Jan. 25, 1908.

ELWOOD BRUNER,
 J. ALLISON BRUNER,
 T. M. REID,
Att'ys for Def'ts in Error.

[Endorsed:] #1636. In the District Court for the District of
 Alaska, Second Division. Joseph Hammer et al., Plaintiff, vs.
 Frank H. Waskey et al., Defendant. Citation. Ira D. Orton, At-
 torney for Defendants.

[Endorsed:] No. 1609. United States Circuit Court of Appeals for the Ninth Circuit. Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie, Plaintiffs in Error, vs. 116 Joseph Hammer, Otto Halla and B. Schwarz, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Second Division. Filed May 19, 1908. F. D. Monckton, Clerk.

117 United States Circuit Court of Appeals for the Ninth Circuit.
No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,
vs.
JOSEPH HAMMER et al., Defendants in Error.

*Certificate of Clerk U. S. Circuit Court of Appeals to Printed
Transcript of Record.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and sixteen (116) pages, numbered from one (1) to one hundred and sixteen (116), inclusive, to be a true copy of the printed Transcript of Record upon writ of error to the United States District Court for the District of Alaska, Second Division, in the above-entitled case as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of June, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

[SEAL.]

F. D. MONCKTON, *Clerk.*

118

No. 1609.

United States Circuit Court of Appeals for the Ninth Circuit.

FRANK H. WASKEY et al., Plaintiffs in Error,

vs.

JOSEPH HAMMER et al., Defendants in Error.

(ADDENDA.)

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

119 At a Stated Term, to Wit, the October Term; A. D. 1908, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Courtroom, in the City and County of San Francisco, on Thursday, the Twentieth Day of October, in the Year of Our Lord One Thousand Nine Hundred and Eight.

Present:

The Honorable William B. Gilbert, Circuit Judge.

Honorable Erskine M. Ross, Circuit Judge.

Honorable William W. Morrow, Circuit Judge.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,

vs.

JOSEPH HAMMER et al., Defendants in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. William H. Metson, counsel for the plaintiffs in error, Mr. P. M. Bruner, counsel for the defendants in error, and Mr. Charles E. Shepard, as amicus curiæ, and submitted to the Court for consideration and decision, with leave to Mr. Shepard to file a brief as amicus curiæ, and with leave to counsel for the plaintiffs in error to file his printed argument, etc.

120 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN,
and ANDREW EADIE, Plaintiffs in Error,
vs.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Defendants in
Error.

Upon Writ of Error to the United States District Court for the
District of Alaska, Second Division.

Opinion U. S. Circuit Court of Appeals.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Ross, *Circuit Judge*, delivered the opinion of the Court:

The subject matter of this action is a piece of mining ground in Alaska, covered by two overlapping mining locations—that under which the defendants in error, who were plaintiffs in the Court below, claim having been made in January, 1904, under the name of “Golden Bull” claim, and that under which the plaintiffs in error, who were the defendants below, assert their rights having been made in January, 1902, under the name of “Bon Voyage” mining
121 claim. The latter was made by the plaintiff in error, Whittren, who afterward executed a deed to Eadie of an undivided interest in it, the remaining plaintiffs in error holding under them as lessees, and, being in the actual possession of the disputed premises mining the same, the action was brought by the defendants in error to recover possession, with damages.

Upon the conclusion of all the evidence in the case, the Court below directed a verdict for the plaintiffs, upon these grounds:

“First. That the location of the Bon Voyage Claim, made in January, 1902, was invalid because no discovery of gold has been proved to have been made within the limits of the claim as surveyed on November 11th, 1903, since such survey.

“Second. That the proofs showing that the locator of the Bon Voyage Mining location, Mr. Whittren, was at the time of the survey in November, and of the subsequent discovery of gold by him on December 13th, 1903, a Deputy Mineral Surveyor of the United States, he is disqualified to acquire title to public mineral lands of the United States while holding that official position, and therefore that his present title and that of his grantee Eadie, to the Bon Voyage, resiting, as the title of both do, upon the location of December 13th, 1903, is invalid.”

The record shows that Whittren located the Bon Voyage as a placer claim on the 1st of January, 1902, and so marked its boundaries upon the ground that they could be readily traced, having

previously discovered gold within such boundaries, and thereafter
duly recorded the notice of his location. In respect
122 to those matters there is no dispute. Being at that time a
competent locator, the ground within the boundaries of his
claim ceased to be open to location or appropriation by anyone else
so long as Whittren complied with the law applicable to the case.

The record shows that, notwithstanding Whittren's location, the
defendant in error Halla, in July, 1902, undertook to make, for a
man named Roth, a location that he called the "Golden Bull,"
embracing a part of the Bon Voyage claim, under which location
by Halla, it is contended by counsel for the defendants in error,
they acquired some right. We think it clear that there is nothing
in that suggestion, for the reason that no part of the ground
covered by the Bon Voyage claim was open to location at the time
that Halla undertook to include it in his location of July, 1902.

Nothing further in regard to that claim of right on the part of the
defendants in error, therefore, need be said.

At the trial Whittren testified, among other things, that on or
about November 11, 1903, he went upon the Bon Voyage claim
for the purpose of starting a man to do the assessment work thereon,
and also for the purpose of making a survey of the claim, having
with him two assistants for that purpose, who carried the tape,
while he, Whittren, who was a surveyor, used the instrument.

It appears that this actual survey disclosed the fact that the
boundaries marked by Whittren in January, 1902, included a little
over twenty acres of ground, and for the purpose of reduc-
123 ing the amount to the statutory limit of twenty acres, Whit-
tren drew in two of the corners—his testimony being in
part as follows:

I "started at point 2, northeast corner, put in a new stake at that
point, 2x2. I found a stake placed by me in 1901, at that point
after considerable trouble. Found it where that No. 2 stake now
stands. The markings were not decipherable at once. It seems to
me the stake was marked Max Roth, by Otto Halla, July 10th, or
something like that, 1902. The stake which Otto Halla used was
the original stake which I had placed there, the northeast corner
stake. It had been whittled off nearly, but there was enough left
so that I could decipher the 'B. V.' From point 2 at the northeast
corner I took bearings on Sledge Island. The compass on the
transit was broken and I took the angle with the vernier. My
field-notes show from the northeast corner to the northwest corner,
his the south peak of Sledge Island. That is the same as I originally
staked it, lined up the same. It hit the center of the peak. When I
put the instrument on I hit the center of the south peak of the
contour of Sledge Island. This stake, which I found at the north-
east corner of the Bon Voyage, having written on it Max Roth,
and having exposed thereon a part of the scribing 'B. V.,' I took
up because I considered it my property and brought it back to
Nome and put it in Dr. Westby's Building, down on Front Street.
It remained there until it was burned up in the fire. The purpose

for which I took this stake was in case of trouble arising over this claim I could have that to defend it. You could make out the scribing underneath the writing, if you knew the 'B. V.' was there. You could see part of the cutting, the number had been erased, originally marking that corner 'No. 4 B. V.' The 'No. 4' you could not make out, but you could make out part of the 'B. V.' All the stakes planted by me when I surveyed the claim was 2 by 2's, each designating the point 'N. E. B. V. 8'; 'N. W. B. V.'; 'S. E. B. V.'; 'S. W. B. V.' At the northeast corner I placed a stake 2 by 2 inches with a nail driven in the top to designate the point, and it was scribed 'N. E. B. V.' and driven in the ground. The bottom of that stake is there yet. It has been burned by a tundra fire. We found the bottom of it in 1906, and nailed a new stake to it. That stake remained there from the 11th of November, 1903, until the same was burned by tundra fire. In 1903, when surveying, I didn't take in the initial stake at all. I took up the four stakes there, the corners, by making the survey and tizing, each corner in regardless of the initial stake. I ran a line from the points 10 to 2 that day. I made the angles of the claim 90 deg. From the northeast to the northwest corner is 660 feet. I had to pull in the northwest corner. It was about 20 feet out. I pulled it in so as to make it exactly 660 feet. I then turned a right angle and ran down to the southwest corner. I measured down 1320 feet and put up a stake at the point 4 instead of the point 12. I found the claim was going to be over 20 acres. I was cutting down the excess. I then turned a right angle and ran to the southeast corner. We may have moved that a foot more or less; that line was about right. We made the distance 660 feet. We ran it back, checked back to the northeast corner. I made the original field-notes November 11th, 1903, on the ground."

By this drawing in of one of the lines of the claim Whittren left out of its boundaries the hole in which he had made the original discovery.

His testimony in respect to the survey was corroborated by that of his two assistants—Taft and Lange—Taft also testifying that after finishing the survey he stayed on the claim and went to work placing mounds around the corner stakes and working on the shaft.

Whittren also testified, among other things, as follows:

"I made a discovery of gold upon the Bon Voyage claim in the year 1903; that was within the boundaries of the Bon Voyage as they now stand; this was in December, 1903; it was about the middle of December; the discovery was made 354 feet from the northwest corner; it was at the representing shaft of 1903. The occasion of my being out there was to pass upon the work I was to pay for. I took the dirt off the surface of the ground where it had been thrown out of the shaft. I had made a discovery prior to that time. I went out there on that day partially to make a discovery. I was not there while the work was being done. I borrowed a sack from Phil Williams and put the dirt in that and brought it to town and thawed it out."

126 At the time Whittren made the discovery in December, 1903, and at the time he made the survey in the preceding month of November, he was a deputy mineral surveyor, but he was not such at the time of his original discovery, nor at the time of his original location of the Bon Voyage in January, 1902—his appointment as such deputy being made in February, 1903. The first question in the case, therefore, is whether the leaving out of his original discovery hole or shaft when he drew in the line so as to reduce the area to the statutory limit of twenty acres, invalidated the entire claim.

It is not contended that Whittren, in making his location in January, 1902, purposely, included more than twenty acres. His act in drawing in one of his lines when his actual survey disclosed the fact that there was a slight excess within his boundaries, certainly tends to show a bona fide desire on his part to conform to the statutory requirement in that regard. That a location made in good faith and otherwise conformable to law is not rendered wholly void by reason of such excess, but that the excessive area only is void, is well settled. *Zimmerman et al. v. Funchion et al.*, 161 Fed. 859, and cases there cited. And that such locator is at liberty to select the portion of the claim that he will reject as such excess is also established law. *Price v. McIntosh*, 121 Fed. 716, where we said:

“We are very clearly of the opinion that if any portion of the ground located by the Kjelsbergs was subject to relocation as being in excess of the permitted width, the owners thereof in pos-
127 session, under the circumstances found by the trial court, could not be deprived of the right to select the portion thereof which they would elect to hold, and that another locator had no right to enter upon that portion of the claim in which they were working and which was a valuable portion thereof, and oust them from possession by making a location thereof. The defendants in error were given no notice that the width of their claim was excessive, or that any part of their location was void, and they were given no opportunity to draw in their lines so as to comply with the local mining regulations. The policy of the mining laws of the United States does not permit a locator to thrust out of the possession of his discovery and the pay streak of his claim, one who has located a placer claim in attempted compliance with the mining rules and laws, and who is actually engaged in mining upon that portion of his claim.”

Does the fact that, when Whittren drew in his line so as to exclude the excess, he left out of the boundaries the hole in which he made his discovery, vitiate the entire claim?

It has been many times decided that in the absence of any intervening right, it is unimportant whether the discovery of mineral in the ground claimed is made before or after the marking of its boundaries. In such a case, the performance of those two acts (where the recording of the notice of location is not required) perfects the location; but both of them are essential to the validity of a mining location under the United States statutes. As said
128 by the Supreme Court in *Gwillim v. Donnellan*, 115 U. S. 45, 50: The discovery “must lie within the limits of the

location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it."

When, therefore, Whittren in November, 1903, left out of his boundaries the only place upon which he had then made a discovery of mineral, he abandoned one of the essential elements of his location. It is true that the evidence tended to show that he still maintained his claim to the ground included within his readjusted boundaries, which were marked as required by the statute and embraced only the statutory area, but within those boundaries he had not then made a discovery of mineral.

Passing, for the moment, the question of his then disqualification because of his then official position, the discovery of mineral within his readjusted boundaries, prior to the acquiring of any right in the premises by anyone else, would have perfected his right to the ground. Such is the purport of the decisions in the cases of *Tonopah and Salt Lake Mining Company v. Tonopah Mining Company*, 125 Fed. 408; *Silver City Gold and Silver Mining Company v. Lowry et al.*, 57 Pac. Rep. 11, and the numerous cases there referred to. As, therefore, the location upon which the right of the defendants in error rests was not made until January, 1904, it results that if Whittren was a competent locator at the time he testified that he made a discovery of gold within his readjusted lines in December, 1903, the judgment below should be reversed.

129 Was he then disqualified by reason of his official position, is therefore the turning point in the case.

Section 452 of the Revised Statutes is as follows:

"The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands, and any person who violates this section shall forthwith be removed from his office."

The later rulings of the Land Department are to the effect that this statute is applicable to a Deputy Surveyor, and therefore that such an officer is prohibited from acquiring or becoming interested in the purchase of any of the public lands. *Muller v. Coleman*, 18 L. D. 394; *In re Neill*, 24 Id. 393; *Floyd v. Montgomery*, 26 Id. 122. See, also, *In re McMicken*, 10 L. D. 97, 11 Id. 96.

In the case of *Hand v. Cook*, 92 Pac. Rep. 3, a majority of the Supreme Court of Nevada held that the statute in question did not apply to a Deputy Mineral Surveyor; but the reverse was held by the Supreme Court of Utah in the case of *Lavagnio v. Uhlig*, 71 Pac. Rep. 1046. It will not do for a court to take a strained and narrow view of the language employed by Congress in its enactments, but rather give such a construction as will carry into effect its obvious intent. We entertain no doubt that a Deputy Mineral Surveyor is an employee "in the General Land Office" within the meaning of the Statute. That is the office in which the land laws of the United States are administered and executed, by and through the
130 thousand and one officers and employees in and out of the particular building or buildings in which that department of the Government is conducted. Nor do we see that there is any much

clearer way to prohibit an act than to say expressly that it is prohibited. That Congress did in the section in question.

In the case of *Prosser v. Finn*, 208 U. S. 67, the Supreme Court held that section 452 applied to a Special Agent of the Land Department who had made an entry under the Timber Culture Act. The Court said:

"The difficulty in the way of any relief being granted to the plaintiff arises from the statute prohibiting any officer, clerk or employee in the General Land Office, directly or indirectly, from purchasing or becoming interested in the purchase of any of the public land. That a special agent of the General Land Office is an employee in that office is, we think, too clear to admit of serious doubt. Referring to the timber-culture statute, Secretary Smith well said: 'When the object of the act is considered, it will be seen that it applied with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge, the use of which it was the intention of the act to prevent. It follows from what has herein been set out that the decision of this Department of date July 7, 1893, was in error, and the same is hereby set aside, and the decision of your office is affirmed.'

131 "It is not clear from any document or decision to which our attention has been called, what is the scope of the duties of a special agent of the Land Office, but the existence of that office or position has long been recognized. Suffice it to say that they have official connection with the General Land Office and are under its supervision and control with respect to the administration of the public lands. *Wells v. Nickles*, 104 U. S., 444; S. C., 1 L. D. 608, 620, 696; Instructions to Special Timber Agents, 2 L. D. 814, 819, 820, 821, 822, 827, 828, 832; Circular of Instructions, 12 L. D. 499. They are in every substantial sense employees in the General Land Office. They are none the less so, even if it be true, as suggested by the learned counsel for the plaintiff, that they have nothing to do with the survey and sale of the public lands or with the investigation of applications for patents or with hearings before registers and receivers. Being employees in the General Land Office, it is not for the Court, in defiance of the explicit words of the statute, to exempt them from its prohibition. Congress has said, without qualification, that employees in the General Land Office shall not, while in the service of that office, purchase or become interested in the purchase, directly or indirectly, of public lands. The provision in question had its origin in the acts of April 25, 1812, c. 68, 2 Stat. 716, and of July 4, 1836, c. 352, 5 Stat. 107. The first of those acts established a General Land Office, while the last one reorganized that office. Each of those acts made provision for the appointment of certain officers, and each limited the prohibition against the purchasing or becoming interested in the purchasing of public lands to the officers or employees named in them, respectively. But the prohibition in the existing statute is not restricted to any particular officers or particular employees of the Land Office, but em-

132

braces 'employees in the General Land Office,' without excepting any of them.

"In the eye of the law this case is not advanced by the fact that he acted in conformity with the opinion of the Commissioner of the General Land Office, who stated, in a letter, that Sec. 452, Rev. Stat., did not apply to special agents. That view, so far from being approved, was reversed, upon formal hearing, by the Secretary of the Interior. Besides, an erroneous interpretation of the statute by the Commissioner would not change the statute or confer any legal right upon Prosser in opposition to the express prohibition against his purchasing or becoming interested in the purchasing of public lands while he was an employee in the General Land Office. The law, as we now recognize it to be, was the law when the plaintiff entered the lands in question, and, being at the time an employee in the Land Office, he could not acquire an interest in the lands that would prevent the Government, by its proper officer or department, from cancelling his entry and treating the lands as public lands which could be patented to others. It may be well to add that the plaintiff's continuing in possession after he ceased to be special agent was not equivalent to a new entry. His rights must be determined by the validity of the original entry at the time it was made."

133 The principle of this case is, in our opinion, applicable to the one now before us.

The judgment is affirmed.

[Endorsed:] No. 1609. United States Circuit Court of Appeals, for the Ninth Circuit. Opinion. Filed May 3, 1909. F. D. Monckton, Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN,
and ANDREW EADIE, Plaintiffs in Error,

vs.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Defendants in
Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the District of
Alaska, Second Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Alaska, Second Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this

134 cause be, and the same is hereby, affirmed, with costs to the defendants in error; and that the defendants in error Joseph Hammer, Otto Halla, and B. Schwarz, recover against the said plaintiffs in error Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie for their costs herein expended, and have execution therefor.

{Endorsed:} Judgment. Filed and Entered May 3, 1909. F. D. Monckton, Clerk.

At a Stated Term, To Wit, the October Term, A. D. 1908, of the United States Circuit Court of Appeals for the Ninth Circuit, Held at the Courtroom, in the City and County of San Francisco, on Wednesday, the Twenty-sixth Day of May, in the Year of Our Lord One Thousand Nine Hundred and Nine.

Present:

The Honorable William B. Gilbert, Circuit Judge.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William H. Hunt, District Judge.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,
vs.
JOSEPH HAMMER et al., Defendants in Error.

Order Denying Petition for Rehearing.

It is ordered that the petition for a rehearing, heretofore filed in the above-entitled cause be, and hereby is denied.

135 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,
vs.
JOSEPH HAMMER et al., Defendants in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eighteen (18) pages, numbered from one (1) to eighteen (18), inclusive, to be a true copy of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed

Transcript of Record in the above-entitled case constitute a true copy of the entire record therein.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of June, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

[SEAL.]

F. D. MONCKTON, *Clerk*.

136 UNITED STATES OF AMERICA, 88:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie are plaintiffs in error, and Joseph Hammer, Otto Halla and B. Schwarz are defendants in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Alaska, Second Division, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into
137 the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

138 [Endorsed:] File No. 21,745. Supreme Court of the United States. No. 519, October Term, 1909. Frank H. Waskey et al., vs. Joseph Hammer et al. Docketed. No. 1609. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Certiorari. Filed Dec. 28, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

139 In the United States Circuit Court of Appeals for the Ninth Circuit, Northern District of California.

No. 1609.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER WHITTREN,
and ANDREW EADIE, Plaintiffs in Error,

vs.

JOSEPH HAMMER, OTTO HALLA, and B. SCHWARZ, Defendants in
Error.

Stipulation (of Counsel Relative to Return to Writ of Certiorari).

It is hereby stipulated by and between the counsel for the Plaintiffs in Error and the Defendants in Error in the above-entitled action, that the certified Transcript of the Record used on the application to the Supreme Court of the United States for a Writ of Certiorari and now on file in said Supreme Court, may be deemed the certified Transcript of Record on return to the Writ of Certiorari issued out of the said Supreme Court in the case; and that the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in making his return to the said Writ may attach thereto a certified copy of this stipulation in lieu of another certified Transcript of the Record.

Dated this 21st day of October, 1909.

IRA D. ORTON,
O. D. COCHRAN,
F. E. FULLER,
CAMPBELL, METSON, DREW, OATMAN &
MANKENZIE AND
E. H. RYAN,

Attorneys for Plaintiffs in Error.

P. M. BRUNER,
EDWARD LANDE,
JOHN P. ALLEN,

Attorneys for Defendants in Error.

140 (Endorsed:) Stipulation of Counsel Relative to Return to Writ of Certiorari. Filed Dec. 28, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

141 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in error,

vs.

JOSEPH HAMMER et al., Defendants in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation of Counsel Relative to Return to Writ of Certiorari.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the next preceding two (2) pages, numbered from and including one (1) to and including two (2), to be a true and correct copy of a "Stipulation of Counsel Relative to Return to Writ of Certiorari," filed in the above-entitled cause on the 23rd day of December, A. D. 1909, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of December, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

142 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1609.

FRANK H. WASKEY et al., Plaintiffs in Error,

vs.

JOSEPH HAMMER et al., Defendants in Error.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of the said Court, in obedience to the annexed Writ of Certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said Writ a certified copy of a stipulation entered into by and between the counsel for the respective parties to the said cause, the original of which stipulation is on file and of record in my office, and,

pursuant thereto, do hereby certify the said stipulation as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of December, A. D. 1909.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.*

[Endorsed:] 519/21,745.

143 [Endorsed:] File No. 21,745. Supreme Court U. S. October Term, 1909. Term No. 519. Frank H. Waskey et al., Petitioners, vs. Joseph Hammer et al. Writ of certiorari and return. Filed January 4, 1910.

84

Office Supreme Court, U. S.
FILED.

JUL 6 1909

JAMES H. McKENNEY,

CLERK

In the Supreme Court

OF THE
UNITED STATES

October Term, 1909.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J.
POTTER WHITTREN, and ANDREW EADIE,

Petitioners,

VS.

JOSEPH HAMMER, OTTO HALLA and B. SCHWARZ,

Defendants.

PETITION FOR WRIT OF CERTIORARI

Requiring the Circuit Court of Appeals for the Ninth Circuit
to Certify to this Court for Its Review and Determination
the Above Entitled Case, No. 1609, of the Docket of
Said Court.

W. H. METSON,
J. C. CAMPBELL,

Attorneys for Petitioners.



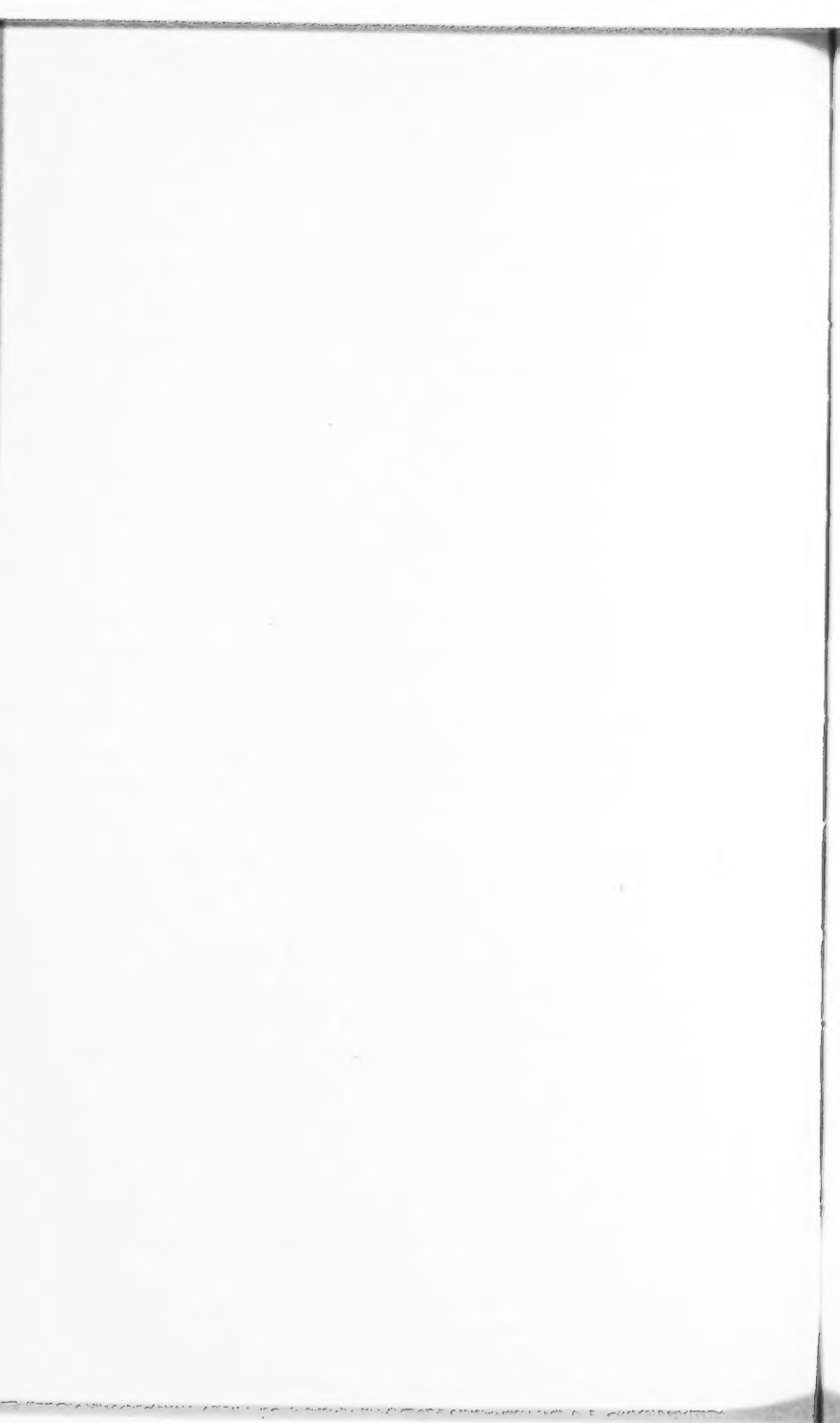
SUMMARY.

Can a relocater defeat a prior, valid placer location partially vested in innocent purchasers, because the first locator afterwards becomes a deputy surveyor—and that in a possessory action to which the Government was not even indirectly a party, nor “office found” an issue? This question has never before been decided.

The decision of the Court of Appeals herein is adverse to the doctrine held by the Supreme Court of the United States in the Alien, the National Bank, Powers of Foreign Corporations, and Indian Reservation Act cases.

Were the United States indirectly a party to this action and for that reason “office found” applicable, even then a direct conflict of authority exists upon this exact principle between the Supreme Courts of Utah and Nevada, and this, therefore, is one of the cases wherein this Court issues certiorari, i. e., “the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State.” (*Forsythe vs. Hammond*, 166 U. S., p. 514.)

The Court of Appeals exceeded its jurisdiction in “intervening” the United States and enforcing “office found” in a possessory action where the United States was not a party; also in adding an additional penalty beyond the statutory one.



In the Supreme Court

OF THE

UNITED STATES

October Term, 190 .

FRANK H. WASKEY, JOSEPH M.
CRABTREE, J. POTTER WHIT-
TREN, AND ANDREW EADIE,
Petitioners,

vs.

JOSEPH HAMMER, OTTO HAL-
LA AND B. SCHWARZ,
Defendants.

PETITION FOR WRIT OF CERTIORARI

REQUIRING THE CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT TO CERTIFY TO THIS COURT FOR
ITS REVIEW AND DETERMINATION THE ABOVE ENTI-
TLED CASE, NO. 1609, OF THE DOCKET OF SAID COURT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Frank H. Waskey, Joseph M. Crabtree, J. Potter Whittren and Andrew Eadie respectfully represents:

That the facts as hereinafter set forth arose out of an action in ejectment to try the possessory title to certain mining ground, worth hundreds of thousands of dollars, as between your petitioners and the respondents; the decision of the Circuit Court of Appeals for the Ninth Circuit applied against innocent purchasers the doctrine of "office found," although the sovereign was *not* a party to the action.

This decision breaks new ground in the law, as it "intervenes" the government in an action where the latter is not a party. The decision is therefore contrary to the doctrine laid down by the Supreme Court of the United States in the alien cases, the National Bank cases and the Indian Reservation cases.

Your petitioners' rights are based upon a *valid* location made by a *duly* qualified locator, but the application of this doctrine of "office found" deprived your petitioners of all rights under this location by reason of the fact that the locator became a deputy mineral surveyor *after* the completion of his

location and had then innocently drawn in his lines, thereby excluding his first discovery hole.

The Circuit Court of Appeals stated that the question involved was a *very close and interesting one*, and made an order that the mandate be stayed so that your petitioners might have an opportunity to apply to this court for a Writ of Certiorari, and upon the filing of a bond in the sum of Fifty Thousand Dollars pending the application for said writ.

The principle involved has never been applied except in cases where the United States was a party, and even then the courts of last resort differ in their conclusions thereon.

The record shows that on January 2, 1902, J. Potter Whittren, one of your petitioners, a citizen of the United States and *then* a duly qualified locator, staked the "Bon Voyage" claim in the District of Alaska. He made a discovery, marked his boundaries and recorded a location notice (Tr., 59, 60, 61, 66). He then made a *valid* location.

A year later, in February, 1903, he became a Deputy Mineral Surveyor (Tr., 87). On November 11, 1903, he went on the ground to survey it and to do his assessment work. In the course of making the survey, he discovered that the claim was to the extent of a fraction of an acre, in excess of the statutory area; so he drew in the northwest and southwest corners in order to make his location conform to the law allowing a locator of a placer claim only twenty

acres. When Whittren moved in his northwest corner, the small hole in which he had discovered gold was left a few feet outside the lines of the claim. In December, 1903, while working on the claim, he again discovered gold (Tr., 87). At this time he was a deputy mineral surveyor.

On January 1, 1904, two years after the location of the "Bon Voyage" the respondents, Otto Halla and B. Schwarz, located the "Golden Bull Claim," which conflicted with the "Bon Voyage" claim (Tr., 54).

Whittren, in 1905, conveyed a half interest in the "Bon Voyage" to the petitioner, Andrew Eadie (Tr., 88), and in June, 1906, Whittren and Eadie made a lease to petitioners Waskey and Crabtree, Eadie also being interested with Waskey and Crabtree in such leases. These grantees were all *innocent* parties (Tr., 91). They had no knowledge of the disqualification of Whittren.

Your petitioners, Waskey, Crabtree and Eadie, proceeded to develop the property under said leases and defined the pay streak.

Thereupon, the respondents brought an action of ejectment against your petitioners, claiming to be the owners and entitled to the possession of the "Golden Bull" claim and alleging an ouster in June, 1906, when Waskey, Eadie and Crabtree had gone on the "Bon Voyage" under the leases mentioned.

Whittren and Eadie answered denying the allegations of the complaint and setting up that they were the owners of the "Bon Voyage," and Waskey and Crabtree their lessees.

Waskey and Crabtree answered denying all of the allegations of the complaint, and setting up affirmatively that Whittren and Eadie were the owners in fee of the disputed land under a valid location made by Whittren on January 1, 1902; that at the time of the location of the "Bon Voyage" it contained a trifle over 20 acres, but upon accurate survey made in November, 1903, Whittren had drawn in the lines to conform to the statutory area; alleged their interest under certain leases from Whittren and Eadie and their quiet, peaceable possession, mining and developing the same for gold.

The respondents in their reply denied all of the allegations of the answer and set up further that petitioners had forfeited the ground for a failure to perform the assessment work for the year 1903, and that when they located, the ground was for that reason, open.

No issue was raised as to the invalidity of the location of Whittren by reason of the exclusion of his discovery when he drew in his lines in November, 1903, or that when he made a second discovery in December, 1903, within his readjusted lines, he was disqualified to make a location by reason of being a

deputy mineral surveyor. The latter fact was disclosed during the trial.

At the close of the case, the plaintiffs (respondents herein) moved the court to direct a verdict for them on various grounds, one of which was the fact that on November 11, 1903, when Whittren had surveyed his claim, and with the intent to comply with the law, had drawn in his lines to exclude a small portion of an acre and thus conform to the statutory area—twenty acres—he had also excluded his discovery point; and although he made another discovery in December, 1903, he was then a deputy mineral surveyor and therefore disqualified to locate.

Upon that ground, the motion to direct a verdict in favor of the plaintiffs (respondents) was granted (Tr., 90-97). Thereafter the jury rendered a verdict in accordance with said motion.

Upon writ of error from the Circuit Court of Appeals, sued out by your petitioners, the judgment of the lower court, based upon said verdict, was affirmed. In affirming the judgment of the lower court the Circuit Court of Appeals treated the case as though it were an adverse patent proceeding with the United States a silent party thereto and held as follows:

That Whittren had made a valid location on January 1, 1902;

That he had a right in November, 1903, to draw

in his lines to make that location conform to the statutory area;

That when in so doing, he left his discovery outside, he lost one of the essential elements of his location.

That he made another discovery on his claim in December, 1903, and if he were not disqualified at that time, he would be entitled to the ground in controversy, as the respondents did not locate until January, 1904. But although he was a qualified and a prior locator, yet later he became a deputy mineral surveyor and was such at the time of this second discovery and he was therefore disqualified to make a location by reason of that fact. The Court holding that as such deputy mineral surveyor he came within the prohibitory provisions of Section 452 of the Revised Statutes of the United States.

Upon that ground, and without any issue having been made therein in the pleadings, in an ordinary action to try the *possessory right* to a mining claim as between two locators, wherein the United States was *not* a party, the Circuit Court of Appeals declared the location of Whittren *void*.

This is the first time in the history of mining law that the doctrine of "office found" has been applied to such an action.

Your petitioners contend that in so doing, the said Circuit Court of Appeals exceeded its jurisdiction.

It exceeded its jurisdiction in this:

(1) In treating an ordinary action in ejectment to try the mere possessory right to a mining claim as though the same were an adverse proceeding for patent in which the United States was a party and deciding in favor of the United States, although not a party to the action.

It exceeded its jurisdiction in this:

(2) In considering and deciding this case it ignored the fact that the United States *alone* had the power upon "office found" to question the right of the petitioner Whittren to make a location on the mineral lands of the United States.

It exceeded its jurisdiction in this:

(3) It proceeded to hear and determine the right of a deputy mineral surveyor to make a mineral location upon the public lands and to declare that he had no such right, in an ordinary action of ejectment instituted to decide the *possessory rights* of the parties, where no question was involved as to the ultimate right of either of the parties *to a patent* for the mining claim in controversy, and where there was no question of a purchase of the same.

It exceeded its jurisdiction in this:

(4) That to the penalty prescribed in Section 452 for a violation of its provisions, it added the further

penalty—that of holding the location made in violation of its provisions void; and this in an ordinary action to try the *possessory* title thereto, where the United States was not a party.

It exceeded its jurisdiction in this:

(5) That in so holding the location of the petitioner Whittren void, it failed to take cognizance of the rights of innocent parties who had purchased interests in said location, and who were entitled to protection.

It exceeded its jurisdiction in this:

(6) In holding that notwithstanding the prior location of your petitioner, Whittren, the location of the respondents, made two years later, should take precedence of the location of Whittren, because the latter was a deputy mineral surveyor when he made his second discovery, although such discovery was prior in time to *any* intervening rights; and this in an action where the United States was not a party.

It exceeded its jurisdiction in this:

(7) In holding that your petitioner, Whittren, as a deputy mineral surveyor, was an employe in the General Land Office and subject to the prohibitory provisions of the statute; and in holding a location made by him as such deputy mineral surveyor void, in an action wherein no question of right to a patent

was involved, and where no issue had been made that the location of Whittren was for that reason void.

I.

The provisions of Section 452 of the Revised Statutes of the United States, which the Circuit Court of Appeals found controlling in this case, are as follows:

"The officers, clerks and employes in the General Land Office are prohibited from . . . *purchasing* or becoming interested in the purchase of any of the public lands; *and any person who violates this section shall forthwith be removed from his office.*"

It is the contention of your petitioners that the provisions of the statute do not deprive any one of the officers, clerks or employes in the General Land Office of the capacity or power to make a mineral location or to purchase the public lands. The section simply withdraws the right to exercise the statutory power to make a *purchase* of the public lands enjoyed by such persons in common with all other citizens of the United States, *while they hold such employment*. And especially provides as a penalty, that if any one of this class of individuals violates the statute in this respect, he shall "forthwith be removed from office." The statute does not state that any such purchase of the public lands shall be *void*.

But, if loss of employment, which is the only penalty in terms provided for by the statute, is not an exclusive penalty for the violation of its provisions, and the courts can go further and declare by way of construction that Congress intended a further penalty, your petitioners submit such further penalty can not be greater than to render a purchase of the public lands *voidable and not void*, and *voidable at the instance of the government alone on "office found."*

In such event, the proceeding in which the question is raised, must necessarily be one wherein the government of the United States is a party. No such condition existed in the case at bar.

If such is not the law, then a citizen of the United States is treated with far less consideration than is an alien. Under Section 452 of the Revised Statutes, an employe in the General Land Office can not *purchase*; while under Section 2319 of the Revised Statutes only citizens or those who have declared their intention to become such can *locate*.

And this court has settled the proposition that only the United States government can on "office found" question the validity of a location made by an alien.

*McKinley Creek Min. Co. vs. Alaska United
M. Co.*, 183 U. S., 563;
Manuel vs. Wulff, 152 U. S., 505.

And its decision in this respect has been followed by the Circuit Courts of Appeal and the State Courts of last resort.

Shamel on Mining, Mineral and Geological Law, p. 108;
Morrison's Mining Rights, 13th Ed., p. 308;
Lindley on Mines & Mining, Vol. 1, Sec. 233;
Martin's Mining Law, Sec. 98;
Costigan on Mines, pp. 167-8;
Snyder on Mines, Sec. 263, and cases cited.

Further, under the ruling of the Circuit Court of Appeals herein, a location once made by a disqualified person in his own name or secretly in the name of another is void; this is so even in the hands of an innocent purchaser. Therefore, the title once bad is incurable throughout the chain of title, no matter how long such chain may be.

We further submit:

The principle controlling in the alien cases and which we contend is applicable in this case, has been adopted and applied by this court in a class of cases arising under the National Banking Act, where the National Banks have been held entitled to recover upon securities taken in the ordinary course of business but in violation of the express provisions of the Act of Congress creating them. In this line of cases, this court has uniformly held that such securities are

not void but voidable *and the sovereign alone can object thereto on "office found."*

National Bank vs. Matthews, 98 U. S., 621, 627;

Oates vs. National Bank, 100 U. S., 239, 249;

National Bank vs. Whitney, 103 U. S., 102-3;

Reynolds vs. Bank, 112 U. S., 405;

Schuyler National Bank vs. Gadsen, 191 U. S., 451.

The same principle is involved in another class of cases wherein by statute foreign corporations are forbidden to do business in a State unless they have complied with certain statutory requirements. This court has held in such cases that in the absence of a provision of the statute declaring contracts made in violation of such statute void, that *no one can question the validity thereof except the State upon a direct proceeding instituted for that purpose.*

Fritts vs. Palmer, 132 U. S., 282;

Seymour vs. Slide, 153 U. S., 523.

A similar principle is involved in another class of cases wherein corporations are authorized by State statutes to hold only a specified amount of real property in order to enable them to carry on business. This court has held that where a corporation violates the statute in this regard, no advantage of the fact can be taken by collateral proceedings on the part of

private individuals, *the matter being one of which the State alone can complain.*

Cowell vs. Springs Co., 100 U. S., 55, 60;
Jones vs. Habersham, 107 U. S., 174;
Blair vs. City of Chicago, 201 U. S., 400,
 450-1.

There is finally one other class of analogous cases involving the throwing open to occupation and entry by the citizens of the United States of certain public lands, the lands to become open to settlers on a certain day at a certain hour; and wherein the proclamation of the President declaring such lands open to settlement contains an express prohibition against any sooner entry thereon than at the hour and date specified in the proclamation, under penalty of loss of right to acquire *any rights* to said lands. Yet this court has upheld locations made by individuals who violated the express provisions of the statute by entering before the hour stated, and held that while the entry of one so disqualified was valid on its face, *no one but the government through its Land Department could question the entry.*

McMichael vs. Murphy, Vol. 197 U. S., 304;
Hodges vs. Colcord, 193 U. S., 192.

The principle laid down by this court in the foregoing classes of cases has been adopted as settled law and followed by numerous adjudications of the

courts of last resort involving analogous circumstances.

Weber vs. Spokane, etc., 64 Fed., 208;
Sanders vs. Thornton, 97 Fed., 863;
Brown vs. Schlerer, 118 Fed., 987;
Blodgett vs. Lanyon Zinc Co., 120 Fed., 893;
Waterbury vs. McKinnon, 146 Fed., 737-9;
Dunlap vs. Mercer, 156 Fed., 545;
Newchatel vs. New York, 49 N. E., 1043;
Ledebuhr vs. Wisconsin Trust Co., 88 N. W.,
 607, 609;
Meyers vs. Campbell, 44 Atl. (N. J.), 863;
Camp vs. Land, 122 Cal., 167.

II.

Admit that the Circuit Court of Appeals was correct in its conclusions respecting a deputy mineral surveyor, coming within the purview of the language used in Section 452, and admit that the class of individuals mentioned therein are prohibited from exercising the right to make a purchase of the public lands while in the General Land Office, what is to be the effect of a violation of such prohibition as expressed in the statute? The same statute creating the offense provides in terms the punishment for its infraction.

"Any person who violates this section *shall forthwith be removed from office.*"

There is no provision that any such purchase shall be void.

The law is well settled that where a statute *creates a new offense* and *denounces the penalty* or gives a new right and declares the remedy, the punishment or the remedy can only be that which the statute prescribes.

Sutherland on Stat. Const., Sec. 327;
Endlich on Interpretation of Stats., Sec. 397;
Oates vs. National Bank, 100 U. S., 239, 249;
Fritts vs. Palmer, 132 U. S., 282;
Seymour vs. Slide, 153 U. S., 523;
Barnet vs. National Bank, 98 U. S., 558;
National Bank vs. Whitney, 103 U. S., 102-3;
National Bank vs. Matthews, 98 U. S., 621,
 627;
DeWolf vs. Johnson, 10 Wheaton, 392;
Martin vs. United States, 168 Fed., 198, 201;
Pratt vs. Short, 79 N. Y., 437, 445;
Behan vs. The People, 17 N. Y., 517;
Bird vs. Dennison, 7 Cal., 308;
Perkins vs. Thornburg, 10 Cal., 190.

We submit the persons mentioned in Section 452 have a statutory right as individuals to purchase the public lands. They also have the right to accept employment in the General Land Office. But if they accept such employment, the right to exercise such

statutory power to purchase the public lands is withdrawn during such employment. If, however, they persist in exercising such power, in the light of the statute, then they must give up their employment.

The proposition is an alternative one. Congress says to these individuals, "you can retain your employment, if you do not exercise your statutory right to purchase; but if you do exercise this right, then you know the consequences—loss of employment."

We submit this is the only reasonable construction of the statute and does not work so harsh a rule as has been invoked by the court in this case, i. e., loss of employment (the penalty which the statute prescribes), and loss of location at the same time.

"On what principle can this Court add another to the penalties declared by the law itself?"

De Wolf vs. Johnson, 10 Wheat., U. S., 392.

In this respect this case is similar in principle to the cases hereinbefore cited under the National Banking Acts and the foreign corporation acts, on the proposition of "office found," and wherein this court has held that action similar to that taken by the Circuit Court of Appeals in this case would be "an additional penalty added beyond those imposed by the law itself."

Oates vs. National Bank, 100 U. S., 239, 249;

Fritts vs. Palmer, 132 U. S., 282.

We therefore contend that the action of the Circuit Court of Appeals for the Ninth Circuit, in this case, viewed in the light of the foregoing authorities, is entirely unwarranted in law, being in conflict with the decisions of this court, with the decisions of the courts of appeal of the other circuits, with those of the courts of last resort of the States and with its own decisions. (*Webber vs. Spokane, etc.*, 64 Fed., 208; *Waterbury vs. McKinnon*, 146 Fed., 737-9.)

We believe the action of the Circuit Court of Appeals in thus exceeding its jurisdiction renders a review of the action of the lower court imperative in order to do complete justice as between the parties and that your petitioners may not be deprived of their property rights without due process of law.

The case is further one of peculiar hardship. The facts of the record show, and the Circuit Court of Appeals so found, that your petitioner, Whittren, made a valid location of the ground in the year 1902, slightly excessive in area, it is true, but which did not invalidate the location (*Richmond vs. Rose*, 114 U. S., 576; *Price vs. McIntosh*, 121 Fed., 716; *Zimmerman vs. Funchion*, 161 Fed., p. 859.) This at a time when he was not a deputy mineral surveyor.

In an honest endeavor to meet the requirements of the law, in surveying his ground a year later and finding it excessive, he drew in his lines to exclude about twenty feet of ground, and in doing so left outside a

little hole in which he had found gold on this placer ground.

In this connection it should be noted that the general mining laws alone are in force in Alaska, and therefore no discovery shaft or posted or recorded notice is required in that district unless by miners' custom, and no custom was shown herein. (*Book vs. Justice M. Co.*, 58 Fed., 106, 115; *Erwin vs. Perigo*, 93 Fed., 609; *Nevada Sierra Oil Co. vs. Home Oil Co.*, 98 Fed., 673; *Sturtevant vs. Vogel*, 167 Fed., 448.)

Whittren went ahead within his adjusted lines and did his assessment work, and again found gold. *At this time he was a deputy mineral surveyor. No rights had intervened.* His location was marked on the ground, a notice recorded since January 1, 1902, and a discovery made. He believed the property his and that he had acquired a legal right to the possession because he had to all intents and purposes made a valid location.

He made a conveyance of a half interest in the property to an *innocent* purchaser. He, with his cotenant, leased the property to your petitioners, Waskey and Crabtree (also innocent parties), so that it might be properly developed and the pay streak exploited. The pay streak was defined after the expenditure of much hard labor, time and money; and when the fruits of such labor were about ready to be enjoyed by your petitioners, the respondents insti-

tuted this action, basing their rights upon an adverse *later* discovery and location made in 1904.

No issue was made that the location of your petitioner was invalid by reason of the fact that Whit-tren was a deputy mineral surveyor when he shut out his old and made his new discovery. He had no chance to defend on the proposition that that matter was a question for the government on "office found." Upon a matter of evidence developed on the trial, taken advantage of by the respondents, and acted upon by the court below, a verdict was directed against him, when the whole record showed that he was entitled to the ground, unless he was disqualified to make the location.

We contended before the Circuit Court of Appeals that a deputy mineral surveyor did not come within the provisions of Section 452 of the Revised Statutes, in that he was neither an officer,

Hand vs. Cook, 92 Pac., 1;

U. S. vs. Hartwell, 6 Wall., 385;

U. S. vs. Germaine, 99 U. S., 508;

U. S. vs. Mouatt, 124 U. S., 303, 307;

U. S. vs. Smith, 124 U. S., 525, 532;

Martin vs. U. S., 168 Fed., 198;

a clerk,

People vs. Fire Comm., 73 N. Y., 437, 442;

People vs. ex rel Satterlea vs. Board of Police

Comm., 75 N. Y., 38;

Hand vs. Cook, *supra*;

nor an employe

- McCluskey vs. Cromwell*, 11 N. Y., 593;
U. S. vs. Meigs, 95 U. S., 748;
Ex parte Burdell, 32 Fed., 681;
Powell vs. U. S., 60 Fed., 689, 690;
U. S. vs. Macdonald, 72 U. S., 898;
Louisville E. & St. L. R. Co. vs. Wilson, 138
 U. S., 501, 505;
Auffmordt vs. Hedden, 137 U. S., 310;
Pack vs. The Mayor, etc., of N. Y., 8 N. Y.,
 222;
Kelly vs. The Mayor of N. Y., 11 N. Y., 432;
The People ex rel Peter Morris vs. Randall,
 73 N. Y., 41;
Blake vs. Ferris, 5 N. Y., 58,

in the General Land Office.

We submit that the question of whether a deputy mineral surveyor comes within the provisions of Section 452, and is debarred from making a location upon the mineral lands of the United States is one wherein there is direct conflict of authority between the courts of last resort of the States of Nevada and of Utah and of the Circuit Court of Appeals for the Ninth Circuit in this case.

The Supreme Court of Utah, in the case of *Lavignino vs. Uhlig*, 71 Pac., 1047, in an *adverse patent* case, in which the United States is an ever present party, holds that a deputy mineral surveyor is dis-

qualified; while the case of *Hand vs. Cook*, 92 Pac., 1, holds that such an individual is not included within the terms "officers, clerks and employees" in the General Land Office.

In commenting upon the case of *Lavignino vs. Uhlig*, Professor Costigan, in a very recent work on *Mining Law*, sustains our view that the validity of such a location can only be questioned by the government and says (p. 170):

"This is but a State decision, for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location. The whole tenor of the Utah decision is that the location by the deputy mineral surveyor is absolutely void, *whereas the protection of innocent purchasers requires that a rule like that applicable to locations by aliens be applied*. It is upon that ground only that a recent Nevada decision upholding a location by a deputy mineral surveyor can be supported. While the Court seems to have been in error in the last-mentioned case in saying that deputy United States mineral surveyors are not covered by the above-mentioned statute, *nobody but the government could possibly object to a location by a deputy mineral surveyor*, and the Court was therefore right in its decision, but erred in the reason given for it."

The case at bar is one in which the decision of the Circuit Court of Appeals is final, and also presents one of the conditions the existence of which influ-

ences this court in exercising the power of *certiorari* to review the action of the Circuit Courts of Appeal. While this court exercises that power but sparingly, it most frequently exercises it where there is a conflict of decision between the Federal Courts of Appeal and the courts of last resort of a State (*Forsythe vs. Hammond*, 166 U. S., 506), a condition clearly shown to exist here.

And the conditions in the case at bar are even more favorable for this court to take action by *certiorari*, by reason of the fact that an excess of jurisdiction is shown on the part of the Circuit Court of Appeals, in rendering a judgment in favor of the United States not a party to, and over which it had acquired no jurisdiction in the action, and against your petitioners, under circumstances of peculiar hardship to the latter.

We respectfully submit herewith a brief upon the law points involved.

Wherefore, your petitioners pray:

1. That the writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and of all proceedings of the Circuit Court of Appeals in

the said case of *Frank H. Waskey et al. vs. Joseph Hammer et al.*, No. 1609, to the end that this cause may be reviewed as allowed by the statute of the United States in such case made and provided.

2. That your petitioner may have such other and further relief in the premises as to this court may seem appropriate and in conformity with law, and that the judgment of the said Circuit Court of Appeals herein may be reversed by this Honorable Court.

And your petitioners will ever pray, etc.

FRANK H. WASKEY,
JOSEPH M. CRABTREE,
J. POTTER WHITTREN,
ANDREW EADIE,
Petitioners.

W. H. METSON,
Their Attorney and Counsel.

W. H. METSON,
J. C. CAMPBELL,
Counsel for Petitioners.

CERTIFICATE OF COUNSEL.

We hereby certify that we have carefully examined the foregoing petition and application for writ of *certiorari*, and that in our opinion, the same is well

founded and that the case is one in which the prayer of the petitioners should be granted by the court.

W. H. METSON,

.....
Counsel for Petitioners.

To Attorneys for Respondent:

Please take notice that on Monday, the *11th* day of *October* 1909, on the opening of court on that day, or as soon thereafter as the matter can be heard, we shall move the Supreme Court of the United States, at the court-room thereof, in the City of Washington, District of Columbia, that the foregoing petition for a writ of *certiorari* be granted.

Dated at San Francisco, this *11th* day of *June*, 1909.

W. H. METSON,
J. C. CAMPBELL,
Counsel for Petitioners.

Service of the above and receipt of copy thereof, together with copy of the foregoing petition is hereby admitted at San Francisco, State of California, this *4th* day of *June*, 1909.

.....*O W Brungs*.....
.....*Edmund Land*.....

Attorneys for Respondent.



84

1911

In the Supreme Court

UNITED STATES

OF DISTRICTS

OF THE

THE PEOPLE OF THE DISTRICT OF COLUMBIA
vs
THE DISTRICT OF COLUMBIA

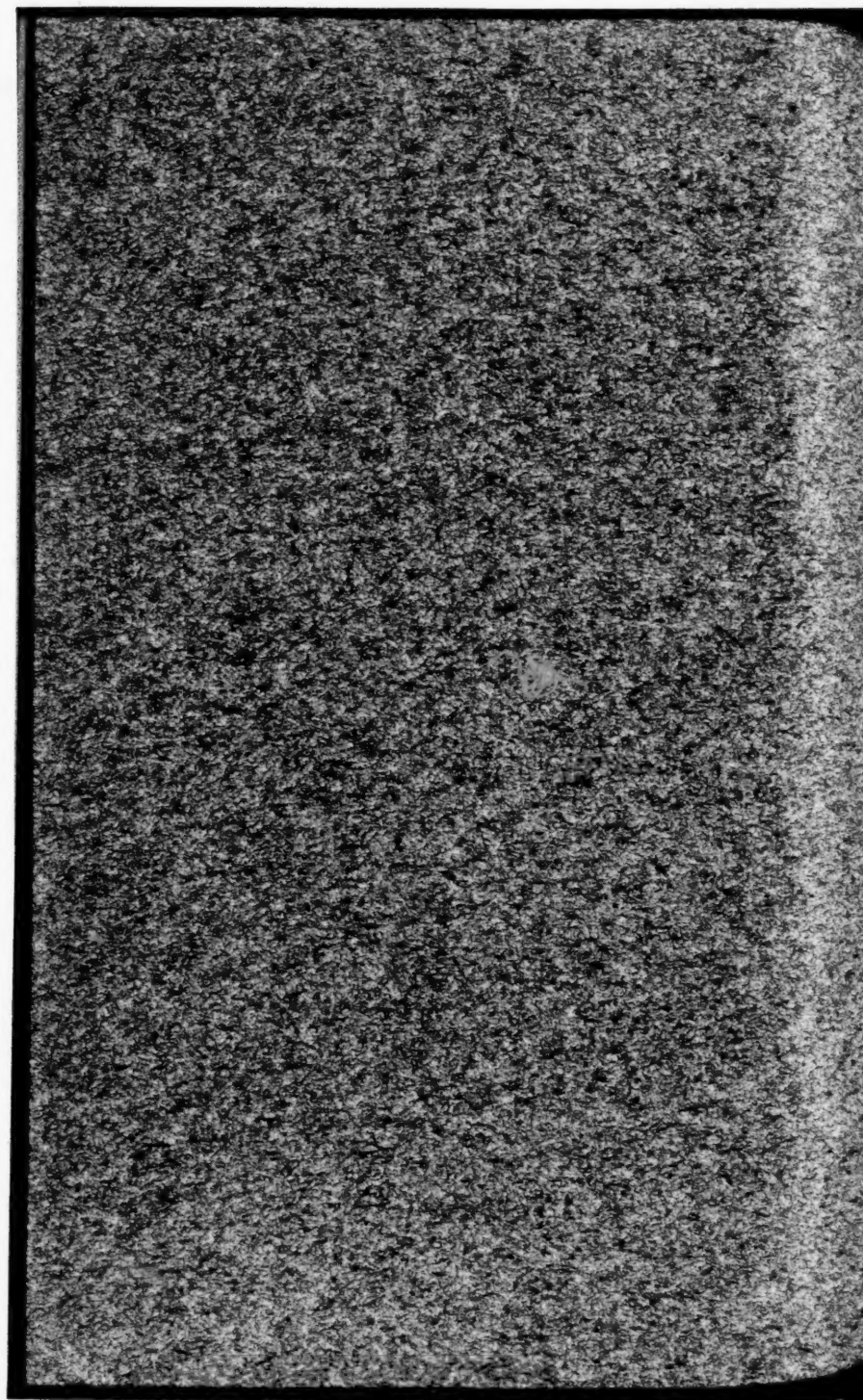
THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA

BRIEF IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS

CAMPBELL, NATHAN BREW
OF THE DISTRICT OF COLUMBIA
vs
THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA



INDEX.

	Page
Argument:	
Excess of jurisdiction shown in declaring location of Mineral Surveyor void.....	13
Excess of jurisdiction shown in imposing other than statutory penalty.....	36
Deputy Mineral Surveyor not within provisions of Section 452	41-46
Facts epitomized	5-6
Innocent purchasers not protected by decision.....	14; 33
Location voidable only on "office found" on principle decided in cases concerning:	
Aliens	20
Foreign Corporations	26
National Banks	24
Ultra vires acts of corporations.....	28
Indian Reservation Acts.....	28
Statement of the case.....	7
Summary	2

SUMMARY.

Can a relocater defeat a prior, valid placer location partially vested in innocent purchasers, because the first locator afterwards becomes a deputy surveyor—and that in a possessory action to which the Government was not even indirectly a party, nor “office found” an issue? This question has never before been decided.

The decision of the Court of Appeals herein is adverse to the doctrine laid down by the Supreme Court of the United States in the Alien, the National Bank, Powers of Foreign Corporations, and Indian Reservation Act cases.

Were the United States indirectly a party to this action and for that reason “office found” applicable, still a direct conflict of authority would exist upon this exact principle between the Supreme Courts of Utah and Nevada, and this, therefore, is one of the cases wherein this Court issues certiorari, i. e., “the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State.” (Forsythe vs. Hammond, 166 U. S., p. 514.)

The Court of Appeals exceeded its jurisdiction in “intervening” the United States and enforcing “office found” in a possessory action where the United States was not a party; also in adding an additional penalty beyond the statutory one.

In the Supreme Court

OF THE
UNITED STATES

October Term.

FRANK H. WASKEY, JOSEPH M.
CRABTREE, J. POTTER WHIT-
TREN, and ANDREW EADIE,
Petitioners,

vs.

JOSEPH HAMMER, OTTO
HALLA and B. SCHWARZ,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents a question of the exercise of powers beyond the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit and Northern District of California; and is one wherein the judgment of the said Court is final unless reviewed by *certiorari*.

The Circuit Court of Appeals, in an action to try the possessory right to a placer mine situate in the

District of Alaska, wherein the United States was not a party, applied the doctrine of "office found" and declared the valid location of your petitioners void, although prior in time to that of respondents, on the ground that the locator had become disqualified to make a mineral location, under Section 452 of the Revised Statutes of the United States.

It so decided because after locating the ground, making a discovery, marking the boundaries and recording a location notice, the locator, finding that he had a small fraction of an acre too much, innocently drew in his lines a year later and thereby excluded his discovery, at a time when he had become a deputy mineral surveyor.

In so doing, the said Circuit Court of Appeals for the Ninth Circuit exceeded its jurisdiction in two respects.

(1.) It treated the case as though the United States was a party thereto, rendering a judgment in its favor although the action did not involve an inquest of office.

(2.) It imposed a penalty upon the petitioners herein other than that prescribed in the statute for its infraction.

To epitomize this case:

One Whittren, while a qualified locator, admittedly made a valid placer location. A year later he was appointed a deputy mineral surveyor. He still later drew in his lines slightly as he had a legal right to do and again discovered gold within his new markings. Then he conveyed to us. When we bought we had no knowledge of Whittren's office of deputy surveyor.

Our opponents "jumped" our mine. Assume them to have been aliens. The action was ejectment and the Government was not a party.

Our location was held invalidated because of Whittren's disqualification in becoming a deputy mineral surveyor.

Our alien opponents, under the doctrine laid down by Mr. Justice McKenna in *Lone Jack vs. Megginson*, affirmed in 82 Fed., 89, and again by the Supreme Court of the United States in *McKinley Creek Mining Co. vs. Alaska United Mining Co.*, 183 U. S., 563, are not disqualified.

We have therefore this anomaly: an alien disqualification to locate does not disqualify; a citizen's disqualification does disqualify even against innocent purchasers. "Inquest of office" is thus applied in the same action against the citizen, but not against the alien.

From the face of a notice of location no one could tell the locator was an alien nor could it be known therefrom that the locator was a deputy surveyor. The principle of the de-

cision was necessarily dependent upon the status of the parties. The status of one is that of a citizen; that of the other an alien. Manifestly, such reasoning results in a flat contradiction and is illogical. Certainly it is opposed in principle to four lines of analogous cases decided by the Supreme Court of the United States.

The proceeding to declare a forfeiture by inquest of office is a privilege of the sovereign. But no governmental power would exercise its discretion to put in motion an inquest of office under the facts of this case.

We found the mine; we defined the boundaries of the pay streak deep in the ground under the ice of ages; we thawed portions of it and put the gravel on the surface after great hardship and at tremendous expense. We did no act that was not in conformity to the law. Simply because our locator innocently drew in his lines a year after the original location was made, but after he had become a deputy mineral surveyor our mine is given to people who merely looked on while we worked.

STATEMENT OF THE CASE.

The record shows that on January 2, 1902, J. Potter Whittren, then a duly qualified locator, staked the "Bon Voyage" claim in the Nome Recording District, District of Alaska. He made a discovery of gold, properly marked his boundaries, innocently including a small fraction over the statutory twenty acres, and posted and recorded a location notice (Tr., 59, 60, 61, 66).

On November 11, 1903, he went on the ground for the purpose of surveying his location and to do his assessment work. While making the survey, he discovered for the first time that the claim included a fraction over twenty acres, and then drew in his north and southwest corners so as to exclude the excess; in doing this, his first discovery hole was left a few feet outside the limits of his claim, as surveyed. In December, 1903, while working on the claim he found gold in another place (Tr., 87). At this time he was a deputy mineral surveyor. He became such deputy mineral surveyor a year after locating.

Two years after the completion of Whittren's location, or in January, 1904, the respondents, Otto Halla and B. Schwarz, located the "Golden Bull" mining claim, which overlapped the "Bon Voyage" (Tr., 54 and Exhibits, Tr., 49, 50).

Whittren conveyed a half interest in the "Bon Voy-

age" in the year 1905, to your petitioner, Andrew Eadie (Tr., 88).

In June, 1906, Whittren and Eadie joined in leasing the ground to your petitioners, Waskey and Crabtree. These grantees were all innocent parties (Tr., 91). They worked diligently under said leases, and defined the pay streak at a large expense of money, time and labor. Whereupon the respondents instituted the ejectment.

Whittren and Eadie answered denying the allegations of the complaint, and setting up that they were the owners of the "Bon Voyage" and that Waskey and Crabtree were their lessees.

Waskey and Crabtree answered denying all of the allegations of the complaint, and setting up affirmatively that Whittren and Eadie were the owners in fee of the disputed land under a valid location, made by Whittren on January 1, 1902; that at the time of the location of the "Bon Voyage" it contained a trifle over twenty acres, but upon accurate survey made in November, 1903, Whittren had drawn in his lines to conform to the statutory area; alleged their interest under certain leases from Whittren and Eadie and their quiet, peaceable possession, mining and developing the same for gold.

The respondents in their reply denied all of the allegations of the answer and set up further that your petitioners had forfeited the ground for a failure to do the assessment work for the year 1903, and that

when they located, the ground was for that reason open.

No issue was raised as to the invalidity of the "Bon Voyage" location by reason of Whittren being disqualified when he excluded his discovery in 1903, upon surveying his claim and drawing in his lines to conform to the law, or that he was so disqualified when he made his second discovery in December, 1903, within his readjusted lines. The latter fact was incidentally disclosed during the trial as a matter of evidence. At the close of the trial, the respondents herein made a motion for the Court to direct a verdict for them on various grounds, one of which was the fact that on November 11, 1903, when Whittren drew in his lines upon making a survey of his claim, he excluded his discovery hole, and although he made another discovery in December, 1903, prior to the respondent's location, he was then a deputy mineral surveyor and therefore disqualified to locate.

Upon this ground, the District Court of Alaska granted the motion and directed the jury to find for the respondents, who returned a verdict in accordance with such instruction (Tr., 90-97).

Upon writ of error sued out by your petitioners, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the lower Court upon the same grounds on which it had directed a verdict for the respondents.

In affirming the judgment of the lower Court, the Circuit Court of Appeals treated the case as though it were an adverse patent proceeding with the United States a silent party thereto, and declared the *prior* location of Whittren *void*.

Preliminary to such a decision, the said Circuit Court of Appeals found all the facts in favor of your petitioners as follows:

That Whittren had made a valid location in January, 1902; that he had a right in November, 1903, to draw in his lines to make that location conform to the statutory area; that when in so doing he left his discovery hole outside he lost one of the essentials of his location; *but that as no other rights had intervened*, the fact that he made another discovery in December, 1903, would have validated the location, were it not that he was, when the later discovery was made, a deputy mineral surveyor of the United States. That such fact disqualified him under the provisions of Section 452 of the Revised Statutes of the United States.

Upon that ground alone, and without any issue having been made on that point in the pleadings, in an action to try the relative possessory rights of two locators to a mining claim, wherein the United States is not a party the Circuit Court of Appeals declared the location of Whittren void, and rendered a judgment in favor of the respondents, although the discovery of Whittren in January, 1902, and his dis-

covery in 1903, were both prior in time to that of the said respondents and innocent persons had purchased.

ARGUMENT.

The case is one of peculiar hardship, involving equities which should be decided in favor of the petitioners if by any right process of legal reasoning they could be so decided.

The main legal question involved was said by the Circuit Court of Appeals for the Ninth Circuit, in deciding the motion to stay the mandate herein, pending the application for the writ of *certiorari*, to be a "most interesting and close one."

That question—whether a change in a location by the locator after he has been made a deputy mineral surveyor can be declared void by reason of the disqualification arising under Section 452 of the Revised Statutes of the United States, in an action by a private individual claiming under a later location, and without the intervention of the United States—has never been adjudicated by this or any other appellate tribunal.

This question is complicated in this case by the fact that when the location of the "Bon Voyage" was made by Whittren in January, 1902, at a time when he was not a deputy mineral surveyor, it was valid in all respects. This the Circuit Court of Appeals found.

And it further found that when he surveyed the ground and drew in his lines to conform to the law and thereafter made another discovery in 1903, his location was the only valid location of the ground and were it not for his then being a deputy mineral surveyor he would be entitled to prevail over the respondents who did not locate until 1904.

But found that as he was such deputy mineral surveyor at that time his location was void. (See Opinion, Tr. Addenda, p. 4.)

We contended in our application for a rehearing in the Circuit Court of Appeals, that its decision was therefore wrong in two respects, viz:

(1) In treating the action as though it were one wherein the United States was a party and on apparent inquest of office finding in favor of the government where it had not obtained jurisdiction over the government.

(2) In further imposing another penalty than that provided for by the statute and applying it to innocent purchasers.

We shall not attempt to do more within the limits of this brief than to refer cursorily to the primary proposition that a deputy mineral surveyor does not come within the provisions of Section 452, in that he is neither an officer, clerk nor employee in the General Land Office.

Admitting, argumentatively, that the Circuit Court of Appeals, holding the affirmative, in this respect, is correct, we shall confine ourselves to showing its error in the two other respects pointed out.

I.

The Circuit Court of Appeals exceeded its jurisdiction when it treated the case as though it were a proceeding of "inquest of office" and declared the location of a deputy mineral surveyor void, as the government was not even indirectly a party thereto.

Section 452 of the Revised Statutes does not declare a location made in violation of the statute *void*. Any such location if questionable at all, in that respect, is voidable only, and then at the instance of the Government alone.

The section of the Revised Statutes which has been construed by the Circuit Court of Appeals against the contention of your petitioners, reads as follows:

"The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall forthwith be removed from his office."

The Circuit Court of Appeals held that our location was void because the locator, a deputy mineral surveyor, was an employee in the General Land Office when he made his second discovery, although this second discovery was prior in point of time to the initiation of any rights on the part of respondents.

The locator of the "Bon Voyage" and his innocent grantees base their rights upon their *possessory* title to the ground in controversy. They are not applying to the government to purchase the title to this land and to obtain evidence of such title in the nature of a patent, in a proceeding of practical inquest of office. None of the authorities cited by the Circuit Court of Appeals in its opinion bear out the views of that court, but on the contrary are in accord with our contention.

The rule invoked by the Court below anticipated nothing for the protection of the innocent grantees of Whittren, who took with no knowledge of the fact that he was disqualified, if such be a fact. The recorded notice of location showed that Whittren had located the ground in January, 1902. No record existed that Whittren had become disqualified to make a location when he transferred a half interest in his original location in 1905 to Eadie, nor when he and Eadie made the leases to Waskey and Crabtree in 1906, under which they at a large expenditure of money, time and energy developed the pay streak on

this ground. Everything on the record related to the location as originally made.

The Circuit Court of Appeals entirely overlooked this point in its opinion, and wiped out the rights of the innocent grantees of Whittren as well as those of Whittren himself upon a false premise, i. e., that his location was not voidable but void.

Our contention is this: Assuming that the Circuit Court of Appeals is correct in its views that a deputy mineral surveyor comes within the purview of the statute quoted (which we deny), yet that section nowhere declares a location made in violation of its provisions void. The only consequence of an infraction of the statute is a summary removal from office. But if by way of construction it can be laid down by the courts that a further penalty shall also attach in the nature of a forfeiture of the land also, then such forfeiture can only be declared by the government in a proper proceeding. Especially is this so as to innocent purchasers.

The question of whether a deputy mineral surveyor is debarred from making a mineral location has been passed upon by the courts in patent cases in which the United States is an ever present party and "office found" an issue, but then only twice, and that both *pro* and *con* by the Supreme Courts of the States of Utah and Nevada, in the cases of *Lavignino vs. Uhlig*, 71 Pac., 1046, and *Hand vs. Cook*, 92 Pac., 1.

It is true the case of *Lavignino vs. Uhlig* went to

the Supreme Court of the United States (198 U. S., 443). It is significant that this tribunal did not pass on the question, deciding the case upon other grounds, but assuming therein for the purpose of argument, that such an individual holding the position of deputy mineral surveyor was not debarred from making a location.

In commenting upon the cases of *Lavignino vs. Uhlig* and *Hand vs. Cook*, Professor Costigan in his recent work on mining law, takes the same position that we do in the case at bar, and makes the same point, which has never been adjudicated by the courts, and that is that no one but the government could question a location made by a deputy mineral surveyor.

He says at page 170 (referring to *Lavignino vs. Uhlig*):

"This is but a State decision, for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location. *The whole tenor of the Utah decision is that the location by the deputy mineral surveyor is absolutely void, whereas the protection of innocent purchasers requires that a rule like that applicable to locations by aliens be applied.*"

And then, discussing *Hand vs. Cook*, goes on to say:

"It is upon this ground only that a recent Nevada decision upholding a location by a deputy mineral surveyor can be supported. While the Court seems to have been in error in the last-mentioned case in saying that deputy United States mineral surveyors are not covered by the above-mentioned statute, *nobody but the government could possibly object to a location by a deputy mineral surveyor, and the Court was therefore right in its decision, but erred in the reason given for it.*" (Italics ours.)

Here is then clear non-partisan authority for our contention, that the principle involved is similar to that of the alien cases.

But we go further than Professor Costigan, and assert that giving to the case of *Lavignino vs. Uhlig* its full value, it is an argument in favor of our and his contention that the validity of such a location can only be questioned in an action where the government is a party. Professor Costigan lost sight of the fact that *Lavignino vs. Uhlig* was an adverse patent suit and in such cases the proceeding is a direct one for the procurement of the title of the United States to the ground and the United States was therefore a party to the proceedings in that case.

The cases cited by the Circuit Court of Appeals in its opinion in support of its reasoning apply only in litigation where the United States is a party. In all

proceedings for patent in the Land Office, where the officers of the United States have the power to hear and determine the rights of the parties, the United States is a party adverse to both the applicant and the contestant.

Necessarily it follows that in all proceedings before the courts on a contest of an application for patent, the parties are there from some branch of the General Land Office where the intervening third party, the United States, is always an ever present but silent litigant.

Billings vs. Aspen Mining & Smelting Co., 52 Fed., 251.

The case of *Prosser vs. Finn*, 208 U. S., 67, upon which the decision of the Circuit Court of Appeals is largely based, is dependent upon the principle we contend should control in this case. For therein the United States was a party to the original proceedings in the Land Office and necessarily with all other parties bound by its judgment.

We have no fault to find with the case of *Prosser vs. Finn* in this respect, however much we may differ with the conclusion of the Circuit Court of Appeals that a deputy mineral surveyor is an employee in the General Land Office of the same status as that of a special agent. The deputy mineral surveyor lacks the first essential of such employment—the rendition of services to the government for pay from the gov-

ernment. While the special agent is in the actual service of the United States, receiving his pay from it, the deputy mineral surveyor is in the service of the party who employs him to make a survey and is paid by him alone. He receives nothing from the United States.

Hand vs. Cook, supra.

But waiving that and to return to the facts of *Prosser vs. Finn*:

Prosser had made a timber land entry in the United States Land Office when in the employ of the United States as a special agent. His entry was there contested and that forum having jurisdiction, heard and determined his rights, and as the United States was a party to the proceedings, judgment was rendered against him. Long thereafter Prosser sued Finn, a subsequent patent grantee, from the United States, to declare Finn a trustee for him, upon the ground that the Land Office had wrongfully denied him (Prosser) his rights. Manifestly, Prosser had had his day in court. He had submitted to the jurisdiction of the Land Office with all parties in interest as litigants, and the United States had prevailed against him upon the principle of "office found."

Prosser vs. Finn is therefore not an authority against us here, but rather in our favor because the United States is not and never was a party in the case at bar.

The Alien Cases.

Our theory in this respect is supported in principle by all the cases wherein the question was raised with reference to locations made by aliens.

Section 2319 of the Revised Statutes declares that *only* citizens or those who have declared their intention to become such shall *locate* the mineral lands; while Section 452 says that no officer, clerk or employee in the General Land Office shall *purchase or become interested in the purchase* of the public lands.

In any case arising under the sections quoted, the questions involved must be considered and decided with reference to the exact language of the statute. This Court lays down this rule of procedure in the case of *Del Monte vs. Last Chance*, 171 U. S., 66-7, wherein it says the question for the court is "what saith the statute," and "beyond the terms of the statute courts cannot go."

Yet, notwithstanding this language this Court has decided in the alien cases, in the face of the statutory provision that only citizens can locate, that if aliens do locate no one can question the validity of the location but the sovereign on office found.

McKinley Creek Mining Co. vs. Alaska United Mining Co., 183 U. S., 563;
Manuel vs. Wulff, 152 U. S., 505.

Says this court in the latter case:

"We are of opinion on the record that as Alfred Manuel was a citizen if his location was valid his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, *and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only.*"

And referring to this decision, the Supreme Court of the United States in the later case of *McKinley Creek Min. Co. vs. Alaska Min. Co.*, *supra*, said:

"The meaning of *Manuel vs. Wulff* is that the location by an alien and all of the rights following from such location *are voidable and not void, and are free from attack by anyone except the government.*"

In that case two of the locators of the mining claim in controversy were aliens.

This rule of law regarding the locations of aliens has been frequently cited in decisions following along the same lines, in both the Circuit Courts of Appeal and the courts of last resort of the States, and it is generally recognized now that notwithstanding the statute, aliens can make locations subject to this right of the government to question their validity.

Shamel on Mining, Mineral and Geological Law, p. 108;

Morrison's Mining Rights, 13th Ed., p. 308;

- Lindley on Mines and Mining*, Vol. 1, Sec. 233;
Martin's Mining Law, Sec. 98;
Costigan on Mines, pp. 167-8;
Snyder on Mines, Sec. 263;
McKinley Creek Mining Co. vs. Alaska United M. Co., 183 U. S., 563;
Manuel vs. Wulff, 152 U. S., 505;
Shea vs. Nilima, 133 Fed., 209, 215;
Tornanses vs. Melsing, 109 Fed., 711;
Lone Jack M. Co. vs. Megginson, 82 Fed., 89;
Billings vs. Aspen M. & S. Co., 51 Fed., 338;
 52 Fed., 251.

Wherein lies the distinction then between an alien disqualified and a citizen disqualified? No harsher rule should be invoked by the government as against one of its own citizens than is applied to a foreigner. A foreign corporation cannot come into a State and do business on better terms than a resident corporation. Why should the sovereignty then permit an *alien* suffering from the inhibition of the statute, to hold a mineral location, until it chooses to question the right of the alien thereto, yet say that any private individual can question the right of a *citizen* laboring under a disqualification, who has the right given him by statute to make such location?

In the early case of *Gouverneur vs. Robertson*, reported in 11 Wheaton, 332, this court in discussing

the policy that permits the alien to hold real estate until an inquest of office found when the law expressly provides against such holding, says:

"It no doubt owes its present authority, if not its origin, to regard to the peace of society and a desire to protect the individuals from arbitrary aggression."

This language was quoted approvingly by the Circuit Court of Appeals for the Eighth Circuit, with reference to a mining location made by an alien, in the case of *Billings vs. Aspen Mining & Smelting Co.*, *supra*.

If it can be deemed an act of arbitrary aggression to disturb an alien locator in the possession of his claim, which the courts frown down upon in order to preserve the peace of society, is it not an arbitrary aggression upon the rights of a citizen of the United States, holding and possessing a valid location, for any subsequent locator to interfere with such location on the ground that he is suffering from a disqualification?

Surely the rule of preserving the peace of society should be invoked on the same terms in the one instance as in the other. It is equally applicable to both conditions.

Cases Arising Under the National Banking Acts.

There is a line of cases decided by the Supreme Court of the United States in which the principle controlling in the alien cases has been adopted and applied. We refer to those cases arising under the laws of the United States relative to the powers of the National Banks. In many of these cases, the banks have taken certain securities in the ordinary course of business in direct violation of the provisions of the Act of Congress.

But has this Court declared such securities void? On the contrary, it has uniformly held such securities enforceable by the banks, when their validity has been questioned by private persons, holding the same voidable and then *only at the instance of the government on office found.*

National Bank vs. Matthews, 98 U. S., 621, 627;

Oates vs. National Bank, 100 U. S., 239, 249;

National Bank vs. Whitney, 103 U. S., 102-3;

Reynolds vs. Bank, 112 U. S., 405;

Schuyler National Bank vs. Gadsen, 191 U. S., 451.

The early case of *National Bank vs. Matthews*, 98 U. S., 621, 627, is a leading case upon the point.

The National Banking Act provided that the banking associations created thereunder might purchase,

hold and convey real estate for certain purposes and no others. It further provided for the acquisition by the banking associations, of land at judgment sales and by several other methods, but especially prohibited the holding of any real estate under mortgage. Notwithstanding the prohibition of the statute, the Union National Bank of St. Louis took a mortgage upon certain real property to secure future advances. Upon an action brought to enjoin the sale by the bank under said mortgage, the power of the bank to accept such security was assailed and the contract alleged to be void. But the Supreme Court of the United States in holding the bank's power could not be attacked collaterally said:

"The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decisions . . . Where a corporation is incompetent to take a title to real estate, a conveyance to it is not void, but only voidable, *and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose.*" (Pages 627-8.) (Italics ours.)

There is a complete line of decisions of this court based upon the foregoing authority, down to that of the case of *Schuyler National Bank vs. Gadsen*, 191

U. S., 451, where this court, in approving the doctrine of *National Bank vs. Matthews*, *supra*, says:

"It is no longer open to controversy that the provisions of the Statutes of the United States forbidding the taking of real estate security by a National Bank for a debt coincidentally contracted do not operate to make the security void, and thus enable the individual who has contracted with the Bank to defeat recovery *but simply subject the bank to be called to account by the Government for exceeding its powers.*" Page 458.) (Italics ours.)

Foreign Corporation Cases.

The same principle is involved in another class of cases decided by this court wherein foreign corporations being forbidden to do business in a State or acquire property therein until they have complied with certain statutory requirements, violate the law in this respect.

In such cases this court has uniformly held that in the absence of any provision of the statute declaring contracts made in violation of the statute void, that no one can question their validity except the sovereignty on direct proceedings instituted for that purpose.

Fritts vs. Palmer, 132 U. S., 282;
Seymour vs. Slide, 153 U. S., 523.

The case of *Fritts vs. Palmer, supra*, is one much cited in the books.

There the question was whether a deed for real estate in Colorado made to a Missouri corporation organized to do business in the former State, but which had not filed in the office of the Secretary of State its articles of incorporation, was absolutely void, passing no title to the grantee. The statutes of Colorado had provided that no foreign corporation should purchase or hold real estate in the State unless in the manner provided by the Colorado laws, and further provided that upon failure to comply with the provisions relative to the filing of its articles, that each stockholder and officer should be liable jointly and severally on all contracts of the company while it was so in default.

The Supreme Court of the United States construing this section said:

"The question whether a corporation having capacity to purchase and hold real estate for certain defined purposes or in certain quantities has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, *concerns only the State within whose limits the property is situated. It can not be raised collaterally by private persons unless there is something in the statute expressly or by necessary implication authorizing them to do so.*" (Italics ours.)

In thus holding, the Supreme Court of the United States based its decision upon the fact that the principle involved was analogous to that raised in the alien cases, the National Banking cases and those cases arising out of the *ultra vires* acts of domestic corporations, in all of which it has been decided that only the government can complain.

Cases Arising Under Ultra Vires Acts of Corporations.

Similar to the foregoing cases are those expressly cited by the Supreme Court in support of the reasoning in the case of *Fritts vs. Palmer, supra*, wherein corporations organized to do business under State laws are authorized by the statute to hold only a limited amount of real property.

This court has settled the law that where a corporation violates the statute in this respect, no advantage of the fact can be taken by a private individual; that only the sovereignty can complain.

Cowell vs. Springs Co., 100 U. S., 55, 60;

Jones vs. Habersham, 107 U. S., 174;

Blair vs. City of Chicago, 201 U. S., 450-1.

Cases Arising Under Indian Reservation Acts.

There is finally one other class of analogous cases involving the throwing open of certain lands of the United States theretofore reserved to Indians, such

lands to become open to settlers on a certain day at an hour stated; and wherein the proclamation of the President declaring such lands open to settlement contains an express prohibition against sooner entry under penalty of loss of power to acquire any right to said lands.

Notwithstanding such prohibition, this court has upheld locations made by individuals who violated the express provisions of the statute by entering before the hour stated, and held that while the entry of one disqualified was valid on its face, no one but the government through its land department could question the entry.

McMichael vs. Murphy, 197 U. S., 304;

Hodges vs. Colcord, 193 U. S., 192.

A case strongly in point as illustrative of this principle is that of *McMichael vs. Murphy*, *supra*, decided by this court a few years ago.

In that case the President under the Indian Appropriation Act of 1889 issued a proclamation declaring that certain lands on and after noon of April 22nd, 1889, *and not before*, should be open for settlement, etc., and further on in said proclamation used the following language: "Warning is hereby again
" expressly given that no person entering upon and
" occupying said lands before said hour . . . of
" April 22, 1889, . . . will ever be permitted to
" enter any of said lands or acquire any rights there-

"to; and that the officers of the United States will "be required to strictly enforce the provisions of the "Act of Congress to the above effect" (26 Stats., 1544, 1546). A man named White did enter and occupy *before* said time, in direct violation of both the Act of Congress and the President's proclamation; he, White, thereafter made an entry thereof in the Land Office. Subsequently, one McMichael entered the same land, and on contest for it the court said as follows:

"Following the adjudged cases, we hold that White's original entry was *prima facie* valid, that is, valid on the face of the record, and McMichael's entry, having been made at the time when White's entry remained uncanceled or not relinquished of record, conferred no right upon him for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy."

To the same effect, that no rights can be incepted by a third party to land covered by a homestead entry, made by one disqualified in fact, until after such original entry is declared void by competent authority, is the case of *Hodges vs. Colcord, supra*.

We also cite to the court the following authorities from the Circuit Courts of Appeal and the courts of

last resort of the various States, in which the doctrine laid down by this court is adopted and followed in analogous cases:

Webber vs. Spokane, etc., 64 Fed., 208;
Sanders vs. Thornton, 97 Fed., 863;
Brown vs. Schlerer, 118 Fed., 987;
Blodgett vs. Lanyon Zinc Co., 120 Fed., 893;
Waterbury vs. McKinnon, 146 Fed., 737-9;
Dunlap vs. Mercer, 156 Fed., 545;
Newchatel vs. New York, 49 N. E., 1043;
Ledebuhr vs. Wisconsin Trust Co., 88 N. W.,
 607, 609;
Meyers vs. Campbell, 44 Atl. (N. J.), 863;
Camp vs. Land, 122 Cal., 167.

The case of *Sanders vs. Thornton*, *supra*, while involving a somewhat different state of facts, is very pertinent. It appeared therein that a citizen of the United States, contrary to the statute, had knowingly purchased certain lands of a Cherokee Indian situate on the Cherokee domain, inducing the latter to use his name and hold the lands in trust, to evade the statute. Upon a suit in unlawful detainer, the point was made that such a purchase being in violation of the law was void, and an instruction to that effect was asked.

The Circuit Court of Appeals for the Eighth Circuit, in holding that such a purchase was not void, said:

"If the defendant was a citizen of the United States and for that reason was not entitled to hold lands and improvements thereon in the Cherokee Nation, these facts alone would not entitle the plaintiff to recover, as the instruction asked broadly asserts. Several other things would have to occur to entitle the plaintiff to oust the defendant. These facts might entitle the sovereign to oust the defendant but, *if the defendant was not entitled to hold lands or improvements thereon in the Cherokee Nation that is no concern of the plaintiff, and he can not profit by it in this action. The sovereign alone, either the United States or the Cherokee Nation, has the right to oust him of his possession or occupancy on that ground.*"

It would seem therefore that under the condition shown by the foregoing cases, until the United States has spoken, no third person can initiate any rights against one who has even gone so far as to *intentionally defy* the express prohibition of the statute.

Why, then, should an innocent duly qualified locator, after making a valid location, be subject to the attacks of every subsequent locator, whether *alien* or *citizen*, because a year and a half later, when he had become a deputy surveyor, he innocently drew in his lines and excluded the special bit of ground on which he had discovered gold? And this notwithstanding the fact that he made another discovery at a time when no rights of any kind had intervened.

What kind of a rule of law is it that would permit

an *alien* locating over this ground to set up, if he desired, the right to have the doctrine of "office found" applied upon any collateral question of his right to so locate, and the *citizen* locator to be denied the right of appealing to the government alone to question his disqualification upon an inquest of office? Yet such a condition is not at all an improbable one. It may exist here in this case unknown to your petitioners. We would then have a *prior valid* location by a *citizen*, superseded by a *subsequent* location by an *alien* in violation of the statute, simply because the one could invoke the doctrine of "office found" and the other could not.

Such is the anomalous condition to which this construction of the law by the decision in the case at bar would lead.

"Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible."

St. Louis & Iron Mountain Ry. vs. Taylor,
210 U. S., 295.

And there is another unfortunate result flowing from such decision.

Suppose a deputy mineral surveyor desiring to evade the statute, employs some one to go out on the public domain and make a location of this or similar

ground, with the understanding that it is to be held in trust for him. The agent acts and makes the location. No notice is conveyed to the world that it is being done for a deputy mineral surveyor. If the location is void when made openly by the surveyor, it is surely void under the words of this statute—"directly or indirectly"—if made secretly under the guise of another's name.

Now then, assume a sale to innocent purchasers of the location. Under the decisions of the Circuit Court of Appeals they acquire no rights as against a subsequent (possibly alien) locator, because the location was void in its inception. What protection is there to be offered to innocent purchasers under this decision?

"It is clear that a purchaser may be in a different position from the locator of the claim, not as against the general government, with which nothing can avail but a strict compliance with the law regulating locations, *but as against other citizens seeking to locate the same ground*. It may be well said that a purchaser in possession under a conveyance regular in form, is in by color of title, which, in time, under the statute of limitations, will ripen into a perfect right, and it seems reasonable to allow him to maintain his position and his right as against one who seeks only to initiate a new claim to the same thing. In doing so, the regulations respecting locations are not at all relaxed, nor is any condition on which the estate

is held set aside. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate."

Harris et el. vs. The Equator Mining & Smelting Co., 8 Fed., 863.

And how is this decision to be reconciled with that of the Circuit Court of Appeals for the Eighth Circuit, in *Sanders vs. Thornton, supra*? The principle controlling is identical. The ground belongs to the sovereignty in each case; certain persons are disqualified to purchase in each case; both violate the provisions of the statute.

"But only the government can complain," says the Circuit Court of Appeals for the Eighth Circuit; and "anyone can complain," says the Circuit Court of Appeals in the case at bar.

We submit that the decision of *Sanders vs. Thornton* exhibits the true rule which should have controlled in this case, as it expresses the principle governing in all of the decisions of this court in analogous cases.

If only for the protection of innocent purchasers the investigation into the validity of such a location as the one at bar should be left to the government alone.

II.

The Circuit Court of Appeals exceeded its jurisdiction when it imposed a penalty other than and in addition to that declared by the statute and applied it to innocent purchasers.

Admit that the Circuit Court of Appeals was correct in its conclusions respecting a deputy mineral surveyor, coming within the provisions of Section 452, and admit that the class of individuals mentioned therein are prohibited from exercising the right to make a purchase of the public lands while in the General Land Office, what is the express effect of a violation of such prohibition as expressed in the statute? The same statute creating the offense provides in terms the punishment for its infraction.

"Any person who violates this section shall forthwith be removed from office."

There is no provision that any such purchase shall be void.

The law is well settled that where a statute creates a new offense and denounces the penalty or gives a new right and declares the remedy, the punishment or the remedy can only be that which the statute prescribes.

Sutherland on Stat. Const., Sec. 327;

Endlich on Interpretation of Stats., Sec. 397;

Oates vs. National Bank, 100 U. S., 239, 249;

- Fritts vs. Palmer*, 132 U. S., 282;
Seymour vs. Slide, 153 U. S., 523;
Barnet vs. National Bank, 98 U. S., 558;
National Bank vs. Whitney, 103 U. S., 102-3;
National Bank vs. Matthews, 98 U. S., 621,
 627;
DeWolf vs. Johnson, 10 Wheaton, 392;
Martin vs. United States, 168 Fed., 198, 201;
Pratt vs. Short, 79 N. Y., 437, 445;
Behan vs. The People, 17 N. Y., 517;
Bird vs. Dennison, 7 Cal., 308;
Perkins vs. Thornburg, 10 Cal., 190.

The persons mentioned in Section 452 have a statutory right as *individuals* to purchase the public lands. They also have the right as individuals, to accept employment from the government in the General Land Office. If they accept such employment the right to exercise such statutory power to purchase the public lands is withdrawn during the period of such employment. If they persist in exercising such power in violation of the statute, while so employed, then they must pay the penalty and forfeit their employment.

The proposition it seems to us is an alternative one. Congress says to these individuals, "you can retain your employment if you do not exercise your statutory power to make a purchase of the public lands; but if you do exercise this power, then you must

“face the consequences—loss of employment by the “government.”

We submit this is the only reasonable construction of the statute, and does not work so harsh a rule as has been invoked by the court in this case, i. e., loss of employment (the penalty which the statute prescribes) and loss of location at the same time.

Where the express liability imposed by Congress for an infraction of this law is the loss of employment the court must presume that Congress believed this sufficient to insure an observance of the limitation imposed upon the persons mentioned in the statute, in the exercise of their right as individuals to make a location of the public mineral lands.

The statute imposes a forfeiture of employment; the Circuit Court of Appeals imposes also a forfeiture of property. In either event, the statute is a penal one and therefore to be strictly construed.

“That penal laws are to be strictly construed” (said Chief Justice Marshall) “is perhaps not much older than construction itself.”

United States vs. Wiltberger, 5 Wheat. (U. S. 95).

In the case of *Oates vs. National Bank*, 100 U. S., 239, 249, where one of the questions was whether a bank could be deemed a *bona fide* holder of a note, having received it under a contract which in its execution involved a violation of the usury laws of the

State, and the statute providing for a forfeiture of the interest on such contracts, the Supreme Court of the United States in discussing this very point say:

"The statute under which the bank was organized, known as the National Banking Act, does not declare the contract under which the usurious interest is to be paid to be *void*. It *denounces no penalty other than a forfeiture of the interest which the note or bill carries*, giving to the debtor the right to sue for and recover twice the amount of interest so paid. *If we should declare the contract of indorsement void, and consequently that no right of action passed to the bank, on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself.*" (Italics ours.)

So, too, in the case of *Fritts vs. Palmer, supra*, a similar question was passed upon by this court, relative to the penalty provided for an infraction of the Colorado statute regarding foreign corporations complying with certain provisions thereof before the right to hold real estate would attach and wherein this court says:

"The constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do *not declare absolutely or wholly void* as to all persons and for every purpose, a conveyance of real estate to a

foreign corporation, which had not previously done what is required before it can rightfully carry on business in the State. Nor do they declare that the title to such property shall remain in the grantor despite his conveyance.

"So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State before acquiring the right to do so, is found in Section 262 of the same chapter . . . *The fair implication is that, in the judgment of the Legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State. It is not for the judiciary at the instance of or for the benefit of private parties claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others.*" (Italics ours.)

We may say with reference to the decision of the Circuit Court of Appeals in the case at bar, as was said by the Supreme Court of the United States in the early case of *De Wolf vs. Johnson*, 10 Wheaton, 392, "on what principle could this court add another to the penalties declared by the law itself?"

We submit no such power exists in the Circuit Court of Appeals or in any other court. The power

of the courts is limited to the enforcement of the law as it is written.

We have not heretofore within the foregoing argument, done more than to casually refer to our position upon the question of the actual disqualification of a deputy mineral surveyor under the provisions of Section 452 to make a mineral location.

We contended before the Circuit Court of Appeals that such surveyor was not disqualified under the statute because by no means could he be considered either an officer,

Hand vs. Cook, 92 Pac., 3;
U. S. vs. Hartwell, 6 Wall., 385;
U. S. vs. Germaine, 99 U. S., 508;
U. S. vs. Moluat, 124 U. S., 303, 307;
U. S. vs. Smith, 124 U. S., 525, 532;
Martin vs. U. S., 168 Fed., 198;

a clerk,

People vs. Fire Comm., 73 N. Y., 437, 442;
People vs. ex rel Satterlea vs. Board of Police Comm., 75 N. Y., 38;
Hand vs. Cook, *supra*;

nor an employee,

McCluskey vs. Cromwell, 11 N. Y., 593;
U. S. vs. Meigs, 95 U. S., 748;
Ex parte Burdell, 32 Fed., 681;

Powell vs. U. S., 60 Fed., 689, 690;
U. S. vs. Macdonald, 72 Fed., 898;
Louisville E. & St. L. R. Co. vs. Wilson, 138
 U. S., 501, 505;
Auffmordt vs. Hedden, 137 U. S., 310;
Pack vs. The Mayor, etc., of N. Y., 8 N. Y.,
 222;
Kelly vs. The Mayor of N. Y., 11 N. Y., 432;
The People ex rel Peter Morris vs. Randall,
 73 N. Y., 41;
Blake vs. Ferris, 5 N. Y., 58,

in the General Land Office.

Our position with reference to the inapplicability of Section 452 to the so-called office of a deputy mineral surveyor is summed up by the Supreme Court of Nevada in the case of *Hand vs. Cook*, *supra*, p. 9, where that court say:

"Deputy mineral surveyors are appointed without limit and for no particular time by the surveyor general of the United States under the provisions of Section 2334, Rev. St., *supra*. They are not required to keep an office at any particular place or at all. They do not remain under the direction or supervision of the surveyor general. They are not obliged to perform any service either for the government or any individual. They are simply persons who have been designated as having the requisite qualifications to make a proper

survey of a mining claim. If they perform any services at all, it must be as a matter of private contract between themselves and the mining claimant. They receive no salary or compensation whatever from the government; nor does the government supply them with instruments or assistants while engaged in making a mineral survey. They have no access to the official records of the surveyor general's office other than that afforded any private citizen. A deputy mineral surveyor may never make a survey after his appointment or he may make fifty or more in a year. The duties of a mineral surveyor are exclusively professional, and in no sense those of a clerk. He keeps no records or accounts, he registers no acts of a superior. He has no custody of public property or papers. His duties consist, when employed by the owner of a mining claim, in making for such owner a survey thereof showing improvements thereon with preliminary plat and field notes of survey. When the field notes and preliminary plat of survey have been filed with the surveyor general, his duty is ended, except it be to correct an error made by him."

We therefore submit that a deputy mineral surveyor bears no relation to the United States, as an officer whose term "embraces the idea of tenure, duration, emolument and duties" (*United States vs. Hartwell*, 6 Wall., 385), all of which elements are singularly lacking with respect to a deputy mineral surveyor.

He can not be said to be a clerk, for he keeps no registers or accounts, nor has he the custody of any books or property belonging to the public or to any person by whom he is employed. His duties simply consist when surveying a claim in preparing a plat and field notes. When these notes and plat are filed in the surveyor general's office, all connection with him is at an end, unless perhaps to correct any error that he may have made therein. His duties are strictly professional, and in no sense could they be declared those of a clerk either in the General Land Office or otherwise.

It was held in the case of *People vs. Fire Commissioners of City of New York*, 73 N. Y., 437, 442, that:

"In its popular sense 'clerks' denotes those whose duties are clerical and they may be very various. The term does not include every employee and subordinate of the department. A clerk in an office is defined to be a person employed in an office, public or private, for keeping records or accounts, whose business is to write or register in proper form the transactions of the tribunal or body to which he belongs; and persons employed to assist as a surveyor in the execution of the laws regulating the storage, sale and use of combustibles and assist the fire marshal in the investigation of the cause of fires, are not clerks within the meaning of the charter. Their duties are not clerical in any sense."

A mineral surveyor receives no compensation from the United States of any kind or character, neither salary nor wages (Section 2334, R. S. U. S.). He is therefore not an employee of the government. Unless the government is to pay him originally, or to pay him in default of his receiving his compensation from those who do employ him, he can not be said to be an employee of the government. The word employee implies continuity of service, and it surely can not be applied to one who neither receives compensation, nor renders service.

Says the Supreme Court of the United States in the case of *Louisville E. & St. L. R. Co. vs. Wilson*, 138 U. S., 501, 505:

"The term 'officers' and 'employees' both alike refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an 'officer' nor an 'employee.' They imply continuity of service and exclude those employed for a special and single transaction. An attorney of an individual retained for a single suit is not his employee. It is true he is engaged to render services but his engagement is rather that of a contractor than that of an employee."

We submit that the relation which a deputy mineral surveyor bears to the United States is simply that of a licensee, his duties being merely transient

and casual. The case of *Hand vs. Cook, supra*, therefore expresses the correct principle of law. Opposed to this decision as we have heretofore shown, is that of the Supreme Court of the State of Utah in *Lavignino vs. Uhlig, supra*.

The decision in the case at bar is final. It also presents one of the conditions, the existence of which influences this court in issuing the writ of *certiorari* to review the action of the Circuit Courts of Appeal. We understand that this court is averse to exercising that power except in certain specified instances, one of which is "the necessity of avoiding conflict between two or more courts of appeal or between "courts of appeal and the courts of a State" (*Forsythe vs. Hammond*, 166 U. S., 514). That condition exists here.

And furthermore, we maintain that the conditions in this case, in other respects are most favorable to the issuance of the writ of *certiorari* by this court.

We have shown that the Circuit Court of Appeals exceeded its jurisdiction in rendering a judgment in favor of the United States herein, without ever having obtained jurisdiction over the government, as it was not a party even indirectly to the action. The Circuit Court of Appeals has therefore arrogated to itself the unwarranted power to "intervene" the United States herein, and thus convert a simple possessory action into an inquest of office on the part of the government itself.

The Circuit Court of Appeals has further transcended its powers by imposing upon the petitioners herein a penalty other than and in addition to that declared by the statute.

For all of which reasons as well as for the peculiar hardship flowing to your petitioners from the unusual circumstances surrounding the facts in this case (which facts we contend should modify the strict application of the statute herein, if applicable at all), we ask that this court grant our petition and issue the writ.

J. C. CAMPBELL,
W. H. METSON,

Attorneys and Counsel for Petitioners.

CAMPBELL, METSON, DREW,
OATMAN & MACKENZIE, AND
E. H. RYAN,

Of Counsel.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1909.

FRANK H. WASKEY, JOSEPH M. CRABTREE, J. POTTER
WHITREN, AND ANDREW EADIE, *Petitioners,*

vs.

JOSEPH HAMMER, OTTO HALLA, AND B. SCHWARZ,
Respondents.

**SUPPLEMENTAL BRIEF IN SUPPORT OF PETI-
TION FOR WRIT OF CERTIORARI.**

In our principal brief, filed in support of the petition for writ of certiorari, we endeavored to show, among other things, that the Circuit Court of Appeals exceeded its jurisdiction

1. In declaring the location of a mining claim by the mineral surveyor void,
2. In imposing other than a statutory penalty.

That these points are well taken is abundantly shown by the decisions cited in support thereof, but supplementary thereto we wish to call attention to the practice of the De-

partment of the Interior with respect to cases wherein citizens have made entries of public lands and afterwards, but before perfecting title, have become "officers, clerks and [or] employees of the General Land Office."

The practice has always been to permit such entries to be perfected, notwithstanding the entrymen were then in the Government service and employed in the General Land Office.

The case of *Winans vs. Beidler*, 15 Land Decisions, 266, although involving a homestead entry, is directly in point, inasmuch as the claimant was seeking to "directly purchase" public lands while an employee of the General Land Office, and the prohibition, if prohibition there was, applied just as much to him as it would to a United States Mineral Surveyor whose rights had been initiated prior to his appointment.

In the case cited it was stated by the Department of the Interior (the emphasis being ours):

"The facts are that Winans was appointed a copyist in the Recorder's Division of your office [General Land Office] on the 18th day of October, 1889, over four months after his entry was made; that he accepted the position and has continued to discharge the duties thereof up to the present time; that his family still reside in Oklahoma and that his home is still there. These facts are so palpably different from the facts in the *McMicken et al.* case, *supra* [10 Land Decisions, 96], that it is not deemed necessary to compare them. The position he holds cannot be said to give him any advantage, in finally securing the land, over the general public; his access to the records of the office can give him no information valuable to him pertaining to his entry or his rights to the tract; there is no opportunity afforded him to practice any fraud; he has nothing to do with the matter of adjudicating the question as to his compliance with the law when that question shall arise; in-

deed he may not hold the place he does, or any other place in the land department when the time arrives to make final proof. In view of these facts I am of the opinion that Section 452, *supra*, does not apply in this case, for I do not believe that Congress intended by the enactment of said section *to deprive any one of valuable property rights*, theretofore lawfully vested in him, simply for the reason that, after such person has made settlement on public land, and made an entry, or application to enter such land under the homestead law, he received an appointment as a copyist in the General Land Office."

Directly in point as stating the view of the General Land Office as to the status of a U. S. Mineral Surveyor, is a letter addressed by the Commissioner to the United States Surveyor-General, Salt Lake City, Utah, dated June 17, 1909.

In this letter it is said:

"A mineral surveyor, who previous to his appointment, had made a homestead entry, could complete his proofs and receive patent. (*Winans vs. Beidler*, 15 L. D., 266-268)."

These rulings show that it is the opinion of the land department that a person who *initiates* title to a tract of public land, either under the agricultural or mineral land laws, and afterward becomes an officer, clerk or employee in the General Land Office, does not thereby forfeit his previously acquired rights, but may in due course perfect his title and receive patent by submitting such proofs and making such payments as the law requires.

Nor, in cases where a mineral location is made after the locator has been appointed a mineral surveyor, has the practice of the land department gone further than to rule that if he proposes to retain the location he "shall forthwith be removed from office."

In connection with this we cite the case of Casimiro R. Barthelemy, where, under dates of May 29 and August 27, 1909, the Commissioner of the General Land Office gave the mineral surveyor the choice of relinquishing his location or of separation from the service, the only penalty the Commissioner could impose in case the mineral surveyor refused to relinquish the location, being to forthwith remove him from office.

Of course, the practice of the land department can be shown only by its decisions. Only decisions of the Secretary of the Interior are published in the form of reports, and, therefore, in order to show the practice existing in the General Land Office we have been compelled to secure certified copies of the decisions of the Commissioner upon which we rely in this connection, and we append to this supplemental brief copies of said decisions.

What was said in the case of Winans vs. Beidler regarding Winans, a homestead claimant, might with equal propriety be said of a mineral surveyor seeking to perfect title to a tract of mineral land.

The particular location here involved was unquestionably valid when made, except as to the excess. (Flagstaff S. M. Co. vs. Tarbett, 98 U. S., 463; Richmond M. Co. vs. Rose, 114 U. S., 576.)

That being so, his property rights having vested by a valid location (Belk vs. Meagher, 104 U. S., 279; Gwillim vs. Donnellan, 115 U. S., 45), his appointment to office, prior to his *amendment* of his location to bring it within the limitations as to acreage prescribed by law, cannot divest him of such *vested* rights. The only way he might have been divested of title was by failure to perform the "assessment" work prescribed by the statute, followed by an adverse relocation.

While our contention is that a mineral surveyor is not an officer, clerk or employee of the General Land Office within

the meaning of Section 452, U. S. Rev. Stat., and as such prohibited from purchasing the public lands, yet if it is admitted, for argument, that he is such an employee, then we submit that under the facts of this case, under the decisions of the land department—the tribunal having direct jurisdiction in the premises—and in reason, the location was valid and the land might be held, worked, and the legal title thereto obtained by the original locator or his grantees, notwithstanding he afterwards accepted an appointment as a United States Mineral Surveyor.

Nor is this in any manner changed by the fact that the original location as marked upon the ground included somewhat more than twenty acres, the excess having been eliminated by drawing in the corner posts prior to the attaching of any adverse rights.

It has been repeatedly held that the right acquired by a mining location is a *property* right. Assuredly, the appointment to the position of United States Mineral Surveyor could not operate to divest the surveyor of such property right in the absence of some express statutory enactment to that effect.

CONSAUL & HELTMAN,
Attorneys and Counselors for Petitioners.

CAMPBELL, METSON, DREW,
OATMAN & MACKENZIE,
AND
E. H. RYAN,
Of Counsel.

Charles F. Consaul.

"B"
MEL

4-207 r.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE.

WASHINGTON, D. C., *October 6, 1909.*


I hereby certify that the annexed copies of letters are true and literal exemplifications from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

JOHN O'CONNELL,

[SEAL.] *Acting Recorder of the General Land Office.*

PSB

In reply please refer to 

9-49389-85608 "N" HGP

1 Ex.

1 Ex.

H. G. P.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE.

WASHINGTON, D. C., *August 27, 1909.*

Address only the
Commissioner of the General Land Office.

Ex parte

CASIMIRO R. BARTHELEMY, : Relieved from suspension.
Mineral Surveyor.

U. S. SURVEYOR-GENERAL,
Phoenix, Arizona.

Sir:

May 29, 1909, you were directed to notify Mineral Surveyor Casimiro Barthelemy that he was suspended, and required to file within sixty days his affidavit, that he had filed for record with the county recorder his waiver and abandonment of the Colera location, and that he does not hold possession or title to any mining claim by location or purchase acquired during his appointment as mineral surveyor.

August 2, 1909, you forwarded the required affidavit, and the suspension of May 29, 1909, is accordingly hereby removed.

Copy hereof enclosed for service.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner.

J. McP.

N

W. J. H.

DEPARTMENT OF THE INTERIOR,

9-62235.

GENERAL LAND OFFICE,

HGP

HGP

WASHINGTON, D. C., *June 17, 1909.*

1 Ex.

Address only the

Commissioner of the General Land Office.

: Mineral Surveyor—Sec. 452, R. S.

UNITED STATES SURVEYOR-GENERAL,

Salt Lake City, Utah.

Sir:

I have your letter of the 25th ultimo, referring for consideration, copy of letter of same date from Clarence S. Jarvis, a mineral surveyor, asking certain questions in relation to Par. 53 of the Manual of Instructions (4-657).

A mineral surveyor who, previous to his appointment, had made a homestead entry, could complete his proofs and receive patent. (Winans vs. Beidler, 15 L. D., 266-268.)

The prohibition in Sec. 452, R. S., became operative from the date of the original act, April 25, 1812, and not from date of the decision in the Bradford case (36 L. D., 61), cited in Par. 53 of the Manual.

Very respectfully,

FRED DENNETT,

Commissioner.

Board of Law Review.

By C. C. HELTMAN.

N

W. J. H.

DEPARTMENT OF THE INTERIOR,

9-49389.

GENERAL LAND OFFICE,

HGP

HGP

WASHINGTON, D. C., May 29, 1909.

1 Ex.

Address only the
Commissioner of the General Land Office.

Mineral Surveyor—mineral location.

UNITED STATES SURVEYOR-GENERAL,
Phoenix, Arizona.

Sir:

It having been represented to this office that Mineral Surveyor Casimiro R. Barthelemy had made in his own name and for himself a mineral location known as the Colera lode claim in Pima mining district, Arizona, you were by letter of March 1, 1909, directed to investigate the charge, and if found to be true, pursuant to department decision in the case of Seymour K. Bradford (36 L. D., 61), allow him sixty days within which to show cause why his appointment should not be revoked.

You report, the 26th ultimo, with evidence of service and copy of response. You find the charge to be true and inclose a certified copy of the location of the Colera lode, a relocation of the Old Goldtree mine; the location was dated and posted November 30, 1908, and recorded December 2, 1908; it is signed, Casimiro R. Barthelemy.

Mineral Surveyor Barthelemy in his response, which is dated April 19, 1909, offers the following in extenuation of the charge which he admits to be true.

On December 2, 1908, I made a location of one claim known as the Calera claim, which Calera means in Spanish Lime Kilm, in which I build a Lime Kilm, to burn lime, of course my intentions were good, and as I can prove that there is no mineral whatever on the ground but a small lime hill, except lime is *classified* as mineral. If I would have seen any ledge or even a stain of mineral I would never have attempted to located, as I had the *opportunities* of locating in valuable districts as the Mowery, Imperial Copper Co. and other districts but as I knew it would be wrong in locating Mineral ground therefore I would not do it. If you wish statements from mining men regarding the claim, I can prove that there is no mineral.

The response is very unsatisfactory; it flatly contradicts the statement made in the notice of location, that there are in the land "valuable mineral deposits" and the repeated reference therein to "the discovery shaft," and places the mineral surveyor in the position of making a mineral location for land which he believed at the time contained no mineral whatever, such as contemplated by the mining laws which in itself was an attempted evasion of the law.

You will notify Mineral Surveyor Barthelemy that he is hereby suspended, and required to file within sixty days for consideration by this office his affidavit that he has filed for record with the County Recorder, his waiver and abandonment of the Colera location, and that he does not hold possession or title to any mining claim by location or purchase acquired during his appointment as mineral surveyor, and that in default his appointment will be revoked without further notice.

Very respectfully,

FRED DENNETT,
Commissioner.



Office Supreme Court, U. S.
FILED.

FEB 24 1911

JAMES H. McKENNEY,
CLERK.

No. ~~84~~ 84

In the Supreme Court
OF THE
United States

FRANK H. WASKEY, JOSEPH M. CRABTREE,
J. POTTER WHITTREN and ANDREW EADIE,
Petitioners,

VS.

JOSEPH HAMMER, OTTO HALLA and
B. SCHWARZ,
Respondents.

**MOTION OF RESPONDENTS TO DISMISS WRIT OF
CERTIORARI ISSUED HEREIN.**

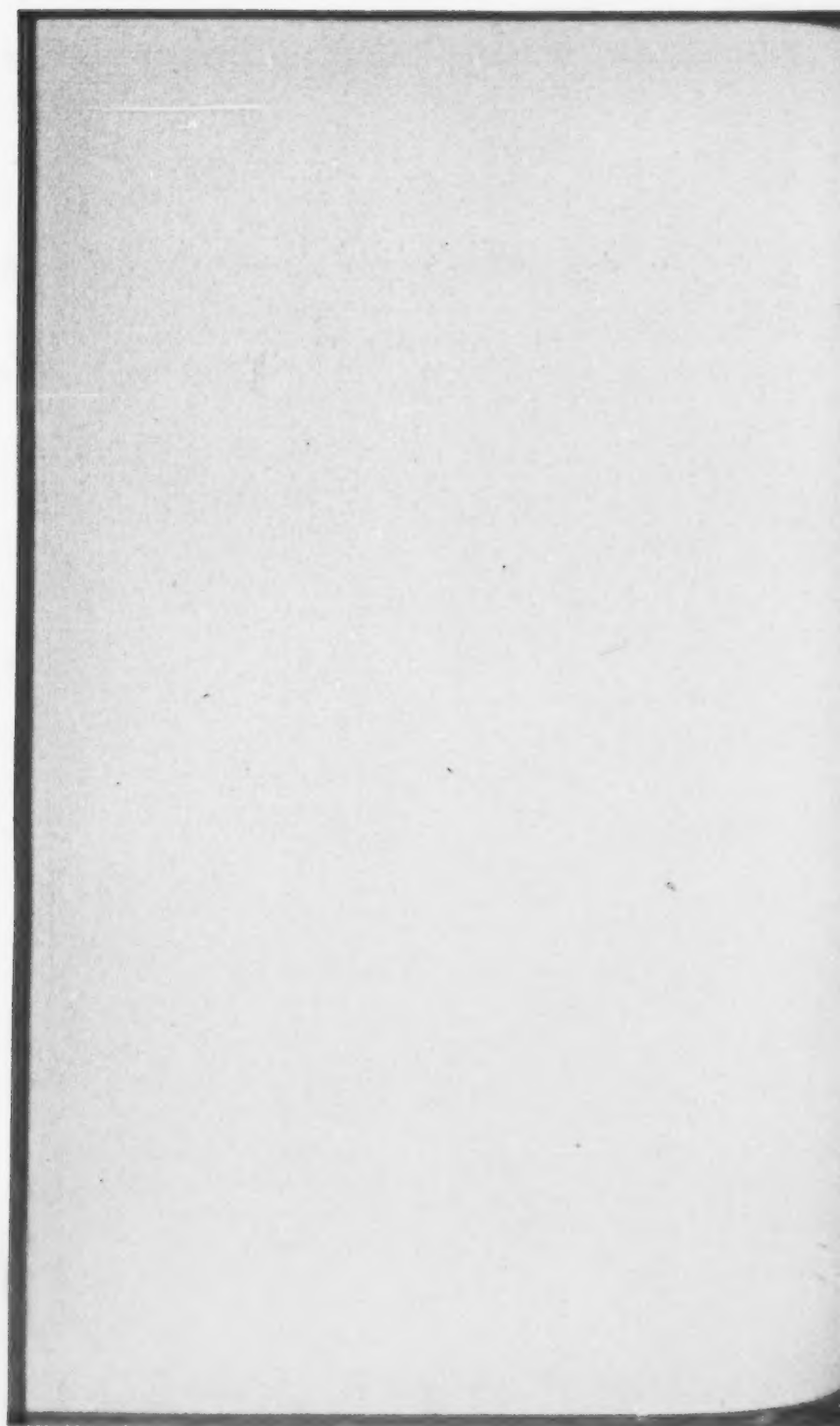
GEORGE W. REA,
Attorney for Respondents.

ALBERT H. ELLIOT,
Of Counsel.

Filed this _____ day of February, 1911.

JAMES H. McKENNEY, Clerk.

By _____ Deputy Clerk.



In the Supreme Court
OF THE
United States

FRANK H. WASKEY, JOSEPH M. CRABTREE,
J. POTTER WHITTREN and ANDREW EADIE,
Petitioners,

VS.

JOSEPH HAMMER, OTTO HALLA and
B. SCHWARZ,
Respondents.

**MOTION OF RESPONDENTS TO DISMISS WRIT OF
CERTIORARI ISSUED HEREIN.**

Come now the respondents Joseph Hammer, Otto Halla and B. Schwarz, in the above entitled action, and move the above entitled Court to dismiss the writ of certiorari heretofore issued in said cause to the Circuit Court of Appeals for the Ninth Circuit, and as ground for said motion respondents allege that this Court was and is entirely without jurisdiction to issue said writ or to make any order in connection therewith. And in that behalf, respondents allege the following facts appearing of record herein.

The controversy involves the question of title to mining property located in the Territory of Alaska. The original decision was in favor of these respondents and was entered by the District Court of Alaska after the verdict of a jury. On appeal by writ of error sued out by petitioners herein, the Circuit Court of Appeals for the Ninth Circuit affirmed the judgment of the lower Court. Thereafter petitioners applied to this Court for a writ of certiorari alleging various grounds of complaint. Respondents did not appear in opposition to the motion and the same was granted and the writ of certiorari issued. Respondents now allege that this Court was and is entirely without jurisdiction to issue the said writ of certiorari; that the said judgment of the said Circuit Court of Appeals for the Ninth Circuit has become final; and that an order should be made by this court herein dismissing said writ of certiorari and all proceedings in connection therewith.

And respondents will ever pray.

JOSEPH HAMMER,

OTTO HALLA,

B. SCHWARZ,

Respondents.

CERTIFICATE OF COUNSEL.

I hereby certify that I have carefully examined the foregoing motion to dismiss the writ of certiorari herein, and that in my opinion, the same is

well founded, and that the case is one in which the motion of respondents should be granted.

ALBERT H. ELLIOT,
Counsel for Respondents.

To Attorneys for Petitioners:

Please take notice that on Monday, the sixth day of March, 1911, on the opening of Court on that day, or as soon thereafter as the matter can be heard, we shall move the Supreme Court of the United States, at the court room thereof in the City of Washington, District of Columbia, that the foregoing motion to dismiss the writ of certiorari issued herein, be granted.

Dated at San Francisco, this 4th day of February, 1911.

GEORGE W. REA,
Attorney for Respondents.

ALBERT H. ELLIOT,
Of Counsel:

Service of the above and receipt of copy thereof, together with copy of the foregoing motion is hereby admitted at San Francisco, State of California, this 4th day of February, 1911.

ALBERT FINK,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Petitioners.



Office Supreme Court, U. S.
FILED.

FEB 24 1911

JAMES H. McKENNEY,
CLERK.

No. 84

In the Supreme Court
OF THE
United States

FRANK H. WASKY, JOSEPH M. CRANTZ,
J. POTTER WHITTEN and ANDREW EADIE,
Petitioners,

VS.

JOSEPH HAMMER, OTTO HALLA and
B. SCHWARZ,
Respondents.

**BRIEF IN SUPPORT OF THE MOTION TO DISMISS
WRIT OF CERTIORARI**

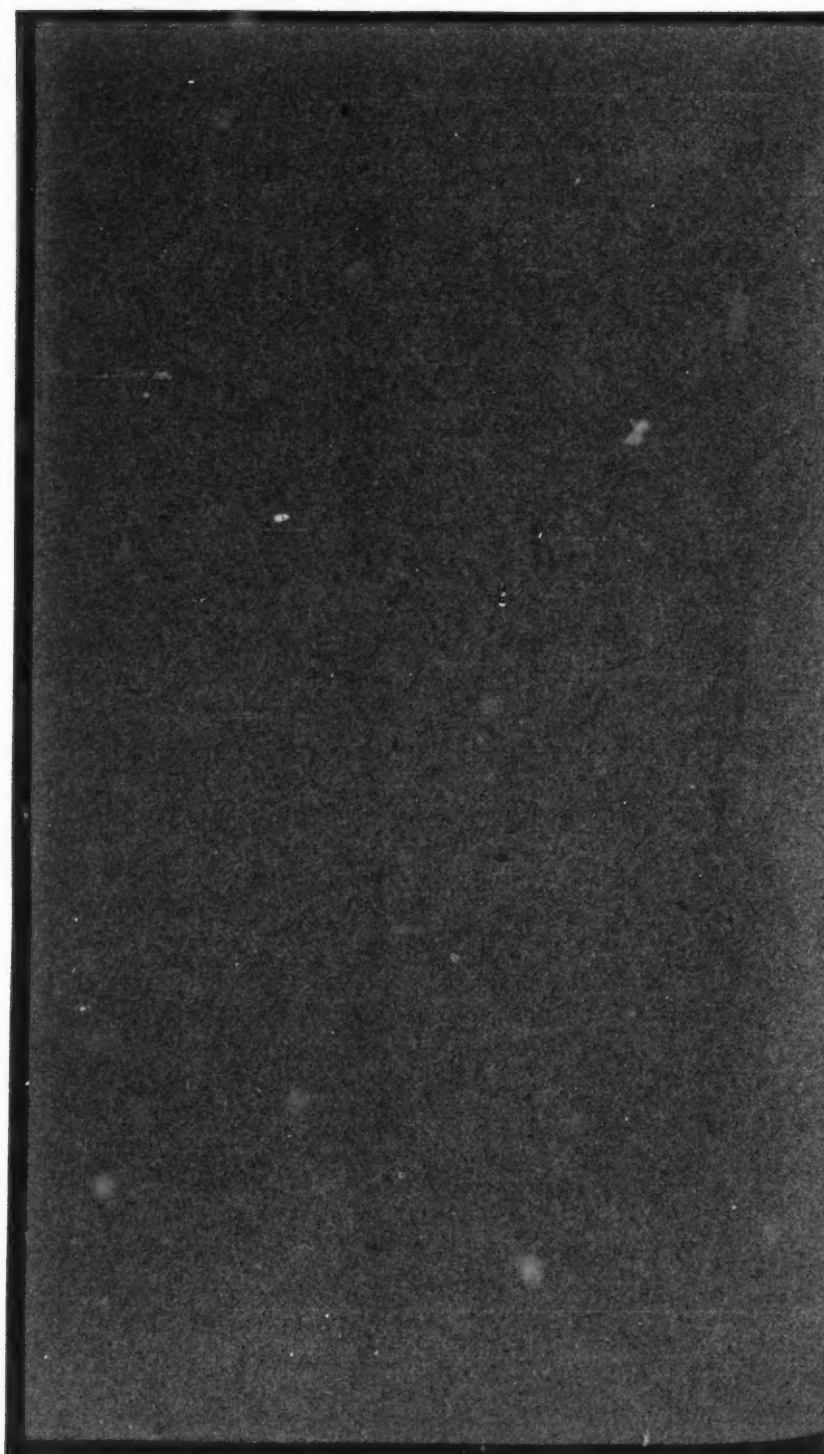
GEORGE W. REA,
Attorney for Respondents.

ALBERT H. ELLIOT,
Of Counsel.

Filed this _____ day of February, 1911.

JAMES H. McKENNEY, Clerk.

By _____ Deputy Clerk.



No. 264

In the Supreme Court

OF THE

United States

FRANK H. WASKEY, JOSEPH M. CRABTREE,
J. POTTER WHITTREN and ANDREW EADIE,
Petitioners,

VS.

JOSEPH HAMMER, OTTO HALLA and
B. SCHWARZ,
Respondents.

BRIEF IN SUPPORT OF THE MOTION TO DISMISS WRIT OF CERTIORARI.

The argument which shows that the Supreme Court can exercise no appellate jurisdiction over cases such as the one at bar, rests upon three propositions as follows:

(a)

The Supreme Court can exercise no appellate jurisdiction (except in cases provided by Section 2 of

Article 3 of the Constitution), save "with such exceptions, and under such regulations as the Congress shall make".

American Construction Company v. Jacksonville Railway, 148 U. S. 373;

In re Dorr, 3 Howard 103;

United States v. Perrin, 131 U. S. 55;

Re Vallandigham, 1 Wallace 243.

The above cases should be distinguished from those cases in which the Supreme Court exercises original jurisdiction which Congress can neither regulate, control nor take away.

United States v. Hudson, 7 Cranch 32;

Cohen v. Virginia, 6 Wheaton 264;

Marberry v. Madison, 1 Cranch 137.

(b)

The Circuit Courts of Appeals Act gives to the Supreme Court jurisdiction to issue writs of certiorari in proper cases.

The Act referred to was passed March 3, 1891, and is entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes" (26 Stat. L. 826).

The part of the above Act under which the writ of certiorari was issued in the case at bar is as follows:

"That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final

decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,

“And the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases,

“Excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

“And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

“And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”

(c)

The Alaska Code which is found in the Act establishing a civil government for Alaska, supersedes the Circuit Courts of Appeals Act and gives appellate jurisdiction to the Supreme Court in cases originating in the District Court of Alaska, only when the judges of the Circuit Court of Appeals shall certify some question or proposition to the Supreme Court.

The Act setting forth the Alaska Code was approved June 6, 1900, and is known as "An Act making further provision for a civil government for Alaska, and for other purposes" (31 Stat. L. 321).

Section 505 of the said Act reads as follows:

"The judgments of the circuit court of appeals shall be final in all cases coming to it from the district court, but whenever the judges of the circuit court of appeals may desire the instruction of the Supreme Court of the United States upon any question or proposition of law which shall have arisen in any case pending before the circuit court of appeals on writ of error to or appeal from the district court, judges may certify such question or proposition to the Supreme Court and thereupon the Supreme Court shall give its instruction upon the questions and propositions certified to it, and its instruction shall be binding upon the circuit court of appeals."

The above Act of Congress was approved at a much later date than the Circuit Courts of Appeals Act and is the latest attempt of Congress to regulate

the appellate jurisdiction of the Supreme Court at least so far as cases originating in the District Court of Alaska are concerned. It is admitted that the judges of the Circuit Court of Appeals did not in the case at bar request the instruction of the Supreme Court upon any question or proposition of law. The direct statement of the section quoted to the effect that the judgments of the Circuit Court of Appeals shall be final excepting in the one case specifically stated, would seem to be conclusive. We do not see how warrant can be found for the issuance of a writ of certiorari under a prior Act which is superseded by the Alaska Act in direct and unequivocal terms.

The same point arose after the passage of the Act establishing the Court of Appeals for the District of Columbia known as "An Act to Establish a Court of Appeals for the District of Columbia and for other purposes", approved February 9th, 1893 (27 Stat. L. 434).

The Supreme Court refused to issue a writ of prohibition because the Act above cited was the latest Act of Congress on the question of the appellate jurisdiction of the Supreme Court, and since under that Act the Supreme Court was not given appellate jurisdiction, it would not issue a writ which was merely ancillary to its appellate jurisdiction.

"This is equally true of this Court, that is to say, that in cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus or certiorari as ancillary thereto."

In re Massachusetts, 197 U. S. 482.

We submit, therefore, that this Court had no appellate jurisdiction over the case at bar and no power to issue the writ of certiorari herein and the same should be dismissed.

Dated, San Francisco,
February 4, 1911.

Respectfully submitted,

GEORGE W. REA,
Attorney for Respondents.

ALBERT H. ELLIOT,
Of Counsel.

In the Supreme Court

OF THE
UNITED STATES

FRANK H. WASKEY, JOSEPH M.
CRABTREE, J. POTTER WHIT-
TREN and ANDREW EADIE,

Petitioners,

vs.

JOSEPH HAMMER, OTTO
HALLA and B. SCHWARZ,

Respondents.

No. 264.

BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS THE WRIT OF CERTIORARI.

We think respondents' motion to dismiss the certiorari without merit.

It cannot be assumed that Congress intended to give to the people of Alaska any less right to have their causes reviewed by certiorari in this Court than has been granted to citizens of the United States residing elsewhere.

The magnitude of the interests often involved compares very favorably with that of causes com-

ing from other sections of the Union; nor are the questions sometimes raised less important.

The Territory is settled by American citizens, who took with them the same inherent rights to the protection of this Court retained by those who remain in more favored localities.

In a republic, where the laws are uniform and of general application, it would seem a violent presumption to assume that Congress intended citizens residing in Kansas to enjoy privileges denied those living in Alaska.

The people of Alaska are as much entitled to the protection of this Court as those of New York, and perhaps in greater need thereof.

To say that where the Circuit Court of Appeals has committed a manifest error this Court has power to issue certiorari if the case originates in Nevada, but no such jurisdiction if it comes from Alaska would seem an anomaly, and it would appear, if this be true, an inhibition upon residence in that Territory.

Could such have been the intention of Congress? If so, why?

Yet the whole argument of respondents is based upon an implied intention of Congress to repeal by the Act of June 6, 1900, the law as it theretofore stood.

The argument is, that though this Court formerly

had jurisdiction to issue the writ, this power was revoked by the Act of June 6, 1900, making further provision for a civil government for Alaska (31 St. L., 321). Yet this Act was induced by the growing importance of the Territory and the rapid development of its resources.

Its purpose was not to abridge or restrict rights theretofore existing, but, on the contrary, to enlarge, amplify and make further provision therefor.

In this connection, it is peculiarly significant to note that neither the appellate jurisdiction nor procedure was in any respect changed, modified or amended, unless as herein contended by respondents.

By the Act of March 3, 1899, Section 202 (23 St. L., 24), appeals and writs of error in criminal actions were allowed from the judgment of the District Court to the Supreme Court of the United States, or to the Circuit Court of Appeals for the Ninth Circuit, in the same manner and under the same regulations as from the Circuit and District Courts of the United States.

By the Act of June 6, 1900, appeals and writs of error were allowed direct to the Supreme Court of the United States in prize cases, in cases which involved the construction or the application of the Constitution of the United States, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority was drawn in question, or in which the

Constitution or law of a State was claimed to be in contravention of the Constitution of the United States (Sec. 504).

An appeal was allowed to the Circuit Court of Appeals from any interlocutory order granting or dissolving, or refusing to grant or dissolve, an injunction (Sec. 507).

It was further enacted:

“All provisions of law now in force regulating procedure and practice of causes brought by appeal or writ of error to the Supreme Court of the United States, or to the Circuit Court of Appeals for the Ninth Circuit, except insofar as the same are inconsistent with any of the provisions of this Act, shall regulate the procedure and practice in cases brought to the courts respectively from the District Court for the District of Alaska” (Sec. 508).

By Section 15 of the Act of March 3, 1891, establishing the Circuit Court of Appeals (26 St. L., 826), it was provided:

“That the Circuit Courts of Appeal, in cases in which the judgments of the Circuit Courts of Appeal are made final by this Act shall have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders and decrees of the Supreme Courts of the several Territories as by this Act they may have to review the judgments, orders and decrees of the

District Court and Circuit Courts; and for that purpose the several Territories shall by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits."

There being in the District of Alaska no court of record other than the District Court, it was held in the case of

The Coquitlam vs. United States, 163 U. S., 347,

that the District Court was to be regarded as the Supreme Court of that Territory within the meaning of the Act above quoted, and of the order of the Supreme Court assigning Alaska to the Ninth Circuit.

In the execution of the duty imposed by the above section, this Court, by an order promulgated May 11, 1891, assigned the Territory of Alaska to the Ninth Judicial Circuit.

It will be thus observed that prior to the Act of June 6, 1900, the appellate jurisdiction of causes originating in the Territory was controlled by the provisions of the Act of March 3, 1891, establishing the Circuit Court of Appeals.

It will be further observed that by the Act of June 6, 1900, no change was made in the then existing law with reference either to the appellate jurisdiction or procedure, unless with the single exception claimed by respondents.

By the Act of June 6, 1900, direct appeals and writs of error were permitted to this Court in the identical cases where such had theretofore been allowed.

Nor was any change made in the prior law as to the allowance of appeals and writs of error to the Circuit Court of Appeals.

So appeals were allowed as theretofore from orders granting or denying or refusing to grant or dissolve an injunction; nor was any change made in the practice or procedure upon writ of error or appeal.

It would seem then somewhat far fetched to assume that Congress, in continuing the identical laws theretofore in effect with reference to this subject, intended to make the single exception claimed by respondents, when no motive therefor can be assigned or conceived.

The exception, permitting this Court to issue certiorari when it sees fit, contained in the sixth section of the Act creating the Circuit Courts of Appeal was designed to give this Court a general supervisory power and control over the decisions of the various Circuit Courts of Appeal, to the end that the decisions thereof might be kept uniform, that flagrant injustice might be prevented and that questions of large public import might receive the final adjudication of this tribunal.

It is not observed how any of these objects would be attained by denying the jurisdiction of this Court

to issue certiorari in a case originating in Alaska. Uniformity of decision would not be secured thereby; flagrant injustice would not be prevented, and the right of this Court to finally settle and determine questions of large public import would be denied.

It is indeed hard to conceive how Congress could intend that a justiciable case arising in the Territory of New Mexico might be reviewed by certiorari from this Court, while the identical cause arising in Alaska could not be.

This is, however, not the first effort that has been made to limit the right of review of causes of action originating in Alaska.

In

The Coquitlam vs. United States, 163 U. S.,
347,

it was insisted that the Circuit Court of Appeals for the Ninth Circuit had no right to review the judgment of the District Court of Alaska, for that: (1) The latter court was not a District Court within the meaning of the sixth section of the Act of 1891. (2) And was not a Supreme Court of a Territory.

And it was insisted that the fact that an appeal or writ of error to the Eighth Circuit, or to the Supreme Court of the United States was permitted from decisions of the United States Court in the Indian Territory by the thirteenth section of the Act creating

the Circuit Court of Appeal was a conclusive indication that Congress did not intend that an appeal or writ of error should lie from the District Court of Alaska to the Circuit Court of Appeals for the Ninth Circuit, for this, being neither a Circuit nor District Court of the United States, nor a Supreme Court of a Territory, it was contended that Congress would have made express provision for review of the decisions of this Court by writ of error or appeal in like manner as it had made provision for review by appeal or writ of error from the decisions of the United States Court of the Indian Territory.

But this Court held, that the whole scope of the Act creating the Circuit Court of Appeal should be looked at and that within the provisions and evident intent of this Act the District Court of Alaska would be considered a Supreme Court of a Territory.

The Court said:

“No reason can be suggested why a Territory of the United States, in which the court of last resort is called a Supreme Court, should be assigned to some circuit established by Congress that does not apply with full force to the Territory of Alaska.

“Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized Territories of the United

States—by whatever name those courts were designated in legislative enactments—should be reviewed by the Circuit Court of Appeals, leaving to this Court the assignment of the respective Territories among the existing circuits.”

In

Lau Ow Bew vs. United States, 144 U. S., 47;
36 L. Ed., 340;

on writ of error to review a decision of the Circuit Court of Appeals for the Ninth Circuit, in a case of habeas corpus, it was suggested that this Court was without jurisdiction to issue the writ.

The argument against the jurisdiction was, that by Section 4 of the Act creating the Circuit Court of Appeals, no review by appeal or otherwise was allowed except as provided in the Act.

Under Section 5, appeals or writs of error were allowed from the Circuit Courts directly to this Court in six specified cases. This case was not one so specified.

By Section 6, it was provided that the Circuit Courts of Appeal

“shall exercise appellate jurisdiction to review . . . final decision of the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law.”

And the same section made the judgments of the Circuit Courts of Appeal final in five specified cases, but this case was not one so specified.

Section 6 further provided:

"In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

The habeas corpus case was one not specified in Section 5, permitting appeals to be taken directly to the Supreme Court, nor in Section 6, as one in which the judgment of the Circuit Court of Appeals was final; nor in the fourth paragraph of Section 6, as a controversy where the matter involved exceeded the sum of one thousand dollars.

Under the express provisions of the Act therefore, it appeared that it could not be taken directly to the Supreme Court from the Circuit Court, nor was it a case in which an appeal lay as a matter of right from the judgment of the Circuit Court of Appeals because of the lack of the jurisdictional amount.

It was insisted that it could not be reviewed by certiorari issued by this Court under the third paragraph of Section 6, permitting this Court:

"In any such case as is *hereinbefore made final* in the Circuit Court of Appeals . . . to

require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination."

for the very obvious reason that it was not a case made final by the decision of the Circuit Court of Appeals.

But this Court very properly overruled this objection to its jurisdiction, holding, that by the Act creating the Circuit Court of Appeals there was an entire distribution of jurisdiction, and that all the appellate jurisdiction not vested in this Court was vested in the court created by the Act—that is, the Circuit Court of Appeals.

Thus, in effect, this Court held, that though the case was not within the terms of the exception contained in the third paragraph of the sixth section of the Act permitting the issuance of the writ on account of its not being a case in which the decision of the Circuit Court of Appeals was final, that nevertheless this Court had the power to issue the writ.

The Court said (*italics ours*):

"The words, 'unless otherwise provided by law,' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by *contemporaneous or subsequent acts should not be construed as taking it away* except when *expressly* so provided. *Implied* repeals were intended to be thereby *guarded* against."

The argument of respondents, based upon the theory of an implied repeal of the Act creating the Circuit Court of Appeal by the Act of June 6, 1900, is, we insist, in the very teeth of this decision.

This decision was rendered March 14, 1892, and it must be assumed that the Act of June 6, 1900, was passed subject thereto.

As before pointed out, it would indeed be curious if Congress by the Act of June 6, 1900, intended to change the existing law in this particular, without using express language indicating this intention.

In

Forsyth vs. Hammond, 166 U. S., 506; 41 L. Ed., 1095,

referring to the Act of March 3, 1891, creating the Circuit Court of Appeals, this Court said:

"It was foreseen that injurious results might follow if an absolute finality of determination was given to the courts of appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision.

"Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that

all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there was placed in the acts creating the courts of appeal, in addition to the other provisions for review by this Court, this enactment" (referring to Paragraph 3 of Section 6).

It would indeed be unfortunate if in Alaska, with its many thousands of miles of seacoast, its sealing, fishing and other rapidly developing industries, such a cause should arise as might involve the most serious international controversy and this Court be found without jurisdiction to review and finally determine the same.

The Court further said (*italics ours*):

"The general language of this clause is noticeable. It applies *to every case* in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this Court to bring before it for review and determination of the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this Court would have in any case, brought to it by appeal or writ of error.

"Unquestionably the *generality* of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this Court a *comprehensive* and *unlimited* power.

"All that is essential is that there be a case pending in the Circuit Court of Appeals, and of

those classes of cases in which the decision of the Court is declared a *finality*, and this Court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination.

"We re-affirm in this case the propositions heretofore announced, to wit, that the power of this Court in certiorari extends to *every case pending in the Circuit Courts of Appeal*, and may be exercised at any time during such pendency, provided the case is one, but for this provision of the statute, would be *finally* determined in that court. And further, that while this power is co-extensive with *all possible necessities* and sufficient to secure to this Court a final control over the litigation in *all the courts of appeal*, it is a power which will be sparingly exercised, etc."

So, in

Holden vs. Stratton, 24 Sup. Ct. Rep., 45; 191 U. S., 115;

it was held that certiorari and not appeal was the proper method of obtaining a review in this Court of a decision of the Circuit Court of Appeals revising an order of the District Court allowing an exemption in a bankruptcy case, though such a cause was not one made final by the decision of the Circuit Court of Appeals within the terms of Paragraph 1 of Section 6 of the Act of March 3, 1891, and therefore not one within the terms of Paragraph 3 of Section 6, granting to this Court jurisdiction to inquire

by certiorari or otherwise into any such case as was made *final* in the Circuit Court of Appeals.

So, in

Whitney vs. Dick, 26 Sup. Ct. Rep., 584; 202
U. S., 132;

the Circuit Court of Appeals for the Ninth Circuit discharged a prisoner who had been convicted in the District Court for the District of Idaho, upon an application for habeas corpus and certiorari to the former court.

An appeal was taken by Whitney, the warden of the Idaho penitentiary, to this Court, and afterward a writ of certiorari to the Circuit Court of Appeals prayed for and allowed.

The judgment of the Circuit Court of Appeals releasing the prisoner on the certiorari and habeas corpus was not such a one as is made *final* by Paragraph 1 of Section 6 of the Act of March 3, 1891, and therefore without the terms of Paragraph 3 of Section 6 of this Act granting power to this Court to issue writs of certiorari.

This Court, nevertheless, dismissed the appeal as being improper, but *reversed* the order of the Circuit Court of Appeals on the writ of certiorari.

In re Alexander McKenzie, Petitioner, 180
U. S., 536; 45 L. Ed., 657; 21 S. Ct. Rep.,
468;

we submit is directly in point and conclusive of the matter.

Here the petitioner, McKenzie, was appointed receiver of certain Alaska mines. Defendants sought an appeal from the order appointing the receiver, but this appeal was denied because not provided for by the *Act of June 6, 1900*, making further provision for a civil government for Alaska.

Thereupon, the defendants procured from the Circuit Court of Appeals for the Ninth Circuit an order allowing the appeal, certiorari in aid thereof, and supersedeas pending the hearing, but McKenzie refused to obey the writ of supersedeas commanding him to deliver possession of the premises therein described to the defendants, from whom he had taken the same under the order of the District Court appointing him receiver, upon the ground, among other things, that inasmuch as no appeal was allowed by the Act of June 6, 1900, from an interlocutory order appointing a receiver in Alaska, such order was not reviewable by the Circuit Court of Appeals, and the supersedeas was therefore void.

McKenzie was forthwith arrested for contempt of the Circuit Court of Appeals in refusing to obey this supersedeas and such proceedings were had that he was duly convicted and punished therefor.

Upon the judgment of conviction and his due commitment, he made original application to this Court for leave to file a petition for habeas corpus.

Upon the hearing in this Court it was pointed out that under Section 507 of the Act of June 6, 1900, making further provision for a civil government for Alaska, *no appeal was allowable from the interlocutory order appointing a receiver.*

The section is as follows:

“An appeal may be taken to the Circuit Court of Appeals from any interlocutory order granting or dissolving an injunction, refusing to grant or dissolve an injunction, made or rendered in any cause pending before the District Court within sixty days after the entry of such interlocutory order.”

It was claimed, however, by those opposing McKenzie's application, that while Section 507 of the Act of June 6, 1900, did not in terms authorize an appeal from an interlocutory order appointing a receiver, that such order was appealable under the provisions of the amendment to Section 7 of the Act of March 3, 1891, creating the Circuit Court of Appeals (31 St. L., 660), and that the *Act of June 6, 1900, applicable to Alaska, should be read in pari materia with the Act creating the Circuit Court of Appeals and the acts amendatory thereof.*

This position was controverted upon exactly the same argument advanced by respondents herein—that is to say, that the Act of June 6, 1900, applicable to Alaska, was a repeal by implication of the act creating the Circuit Court of Appeals, and that if it

had been the intention of Congress to make appealable an order appointing a receiver in Alaska, it would so have appeared in the Act, and that the fact that such an order was made appealable by the amendment to the seventh section of the Act creating the Circuit Court of Appeals, while expressly excluded from section 507 of the Act of June 6, 1900, *was conclusive that it was the intention of Congress that such an order should not be appealable when made by a district court in Alaska.*

But this Court held that the Act of June 6, 1900, applicable to Alaska, should be read *in pari materia* with the *Act of March 3, 1891*, creating the Circuit Court of Appeals, and its amendments, so as to give effect to the provisions contained in the Act of March 3, 1891, but *omitted* from the Act of June 6, 1900.

It is not apparent why the same construction which was extended to section seven should not be applied to section six of the same Act. That is to say, if section 7 of the Act of March 3, 1891, and its amendments, is to be read *in pari materia* with the Act of June 6, 1900, making further provision for a civil government for Alaska, so as to give effect to provisions contained in the former but omitted from the latter, it is not quite clear why section 6 should not likewise be read *in pari materia*, so as to give like effect to a provision in it contained and omitted from the Act applicable to Alaska.

This, of necessity, must have been precisely what Congress intended.

The case of

In re Massachusetts, 197 U. S., 482,

cited by respondents, has no application to the matter under discussion.

Here, a cause in equity was pending in the Supreme Court of the District of Columbia by John B. Cotton, complainant, against Leslie M. Shaw, Secretary of the Treasury, and John L. Bates, Governor of the Commonwealth of Massachusetts, in which the complainant asserted his right to an attorney's lien upon the papers of his client, including a certain warrant for \$1,611,740.85, and prayed, among other things, that Leslie M. Shaw might be restrained from issuing a duplicate thereof, and John L. Bates restrained from asking, demanding or receiving such duplicate.

While this suit was pending in the Supreme Court of the District of Columbia, the State of Massachusetts applied to this Court for writs of prohibition, *mandamus* and *certiorari* to restrain the justices of the Supreme Court of the District of Columbia from taking further proceedings, and entertaining further jurisdiction therein.

This Court merely held, that as it had neither original nor appellate jurisdiction over the controversy, it was without power to grant the prayed for writs as

ancillary thereto, and the reason of the decision is based upon the fact of the existence of a Court of Appeals for the District of Columbia, having appellate jurisdiction over the Supreme Court and to which, of course, this application should have been addressed.

The case would be in point, if the petitioners herein had made their application for *certiorari* to this Court directly from the judgment of the District Court of Alaska, and before the review thereof by writ of error to the Circuit Court of Appeals for the Ninth Circuit.

That this Court is without jurisdiction to issue, when it sees fit, a writ of *certiorari* to review the final decision of the Court of Appeals for the District of Columbia we think will hardly be contended.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1911.

No. 84.

FRANK H. WASKEY, JOSEPH M.
CRABTREE, J. POTTER WHIT-
TREN and ANDREW EADIE,
Plaintiffs in Error and Petitioners,

vs.

JOSEPH HAMMER, OTTO HAL-
LA and D. SCHWARTZ,
Defendants in Error and Respondents.

BRIEF IN BEHALF OF FRANK H. WASKEY AND JOSEPH M. CRABTREE.

This action is in the Supreme Court of the United States on Writ of Certiorari issued to the Circuit Court of Appeals, Ninth Circuit, in October, 1909.

This litigation involves the construction of acts of Congress, and an excess of jurisdiction upon the part of the Circuit Court of Appeals because on its own motion, without process or pleadings, it "intervened" the United States as a party to this action by enforcing the doctrine of "office found."

THE FACTS.

Whittren, a qualified citizen, on January 2nd, 1902, duly and fully marked by stakes a placer mine at Nome, Alaska, and posted thereon a written location notice which was recorded. This claim (the "Bon Voyage") was in a gold gravel district where a large area of auriferous sands was overlaid with sod.

Later Whittren, within his stakes, dug a hole through the tundra to the gold-bearing strata and extracting a portion thereof, panned the same and found gold dust therein (fols. 59-60, 62).

November 11, 1903, Whittren, who *that* year had been appointed as a Deputy Mineral Surveyor while surveying his location, discovered for the first time that his claim contained a fraction more than twenty acres (fols. 64-5, 72).

He then drew in some of his monuments, discarding the excess area, and in so doing the hole from which he had first panned gold dust, was a few feet outside the new stakes (fols. 73-4).

In December, 1903, he made another discovery of gold dust within his readjusted lines (fol. 87).

In December, 1904, respondents Halla and Schwartz "jumped" the "Bon Voyage" by overlapping thereon their "Golden Bull" location (fols. 45-50, 54).

In 1905, Whittren, for value, conveyed to Eadie

a one-half interest, and in June, 1906, they leased for value to Waskey and Crabtree this "Bon Voyage" claim (fols. 89, 91).

These grantees were innocent parties and from the date of the making of the conveyances, continuously worked the ground during the mining season (fols. 91-2).

After the pay streak was developed and demonstrated by the said lessees of Eadie and Whittren, the respondents herein instituted ejectment, basing their title on their "Golden Bull" location.

Waskey and Crabtree, lessees of Eadie, in their answer, set up the staking of the "Bon Voyage" location on January 1, 1902, the discovery of gold later and the survey in November, 1903, which showed a trifling excess over the legal limit; the drawing in of the lines so as to cast off this surplus; their leases, possession and development of the gold-bearing gravels.

The alleged invalidity of the "Bon Voyage" because Whittren drew in his lines in November, 1903, and thereby left the hole from which he first panned gold dust, outside of his new stakes, or the fact that Whittren was disqualified in December, 1903, when he panned gold dust within his readjusted lines from his second hole because he was then a deputy mineral surveyor, were *not* pleaded.

Whittren's appointment as a deputy mineral surveyor was collaterally disclosed at the trial.

Upon the close of the evidence plaintiffs made a motion for and a directed verdict was given because on November 11, 1903, when Whittren drew in his lines he had left his first discovery hole outside thereof and that his second discovery of gold in December, 1903, although long prior to plaintiffs' location, was made at a time when he was a mineral surveyor and disqualified. Judgment followed accordingly and it was affirmed on appeal for the above reason.

The Circuit Court of Appeals found that Whittren's "Bon Voyage" location made in 1902 was valid; that he had a right in November, 1903, to draw in his stakes and abandon the excess over twenty acres; that when in so doing he excluded from within the lines of his location the first discovery hole, he lost one of the essentials of his location; that Whittren's second discovery in December, 1903, before other rights had intervened, would have *re-validated* his claim were it not that he was then a mineral surveyor and therefore, under section 452 of the Revised Statutes, disqualified.

The Circuit Court of Appeals in its opinion treated the case as though it were an adverse patent proceeding with the United States an active adverse *party* to the litigation. It declared the Whittren location void, although no issue had been raised by the pleadings as to the disqualification of Whittren and although both discoveries of Whittren in Jan-

uary, 1902, and December, 1903, were prior to that of plaintiffs below. It dealt out the same penalty to the innocent purchasers for value without notice, who by their expenditures of labor and money, had proven the ground valuable.

The Circuit Court of Appeals declared on the petition to recall the mandate that the question of whether the United States could be intervened in a case where there was no process or pleading to support its presence, thereby allowing an individual to avail himself of the doctrine of "office found," to be a close one.

This case presents features of peculiar hardship. The decision of the Circuit Court of Appeals metes out to the innocent purchasers from Whittren, a punishment which we assert the statute itself (Sec. 452, R. S.), does not apply even to persons coming within the prohibition thereof.

In other words our contention is, that the statute provides but one penalty for a violation thereof, viz: forfeiture of employment.

But conceding that by construction it may be said to make invalid any mineral location made by the persons mentioned therein, such invalidity could be questioned alone by the Government under the proceeding of "office found."

STATUTE UNDER CONSTRUCTION.

"The officers, clerks and employees in the General Land Office are prohibited from di-

rectly or indirectly purchasing or becoming interested in the purchase of any of the public lands; and any person who violates this section shall forthwith be removed from his office."

Section 452, R. S. U. S.

Petitioners' contention:

Error of Circuit Court of Appeals—

- (1) In applying doctrine of "office found";
- (2) In failing to apply doctrine controlling in the case of innocent purchasers.
- (3) In maintaining that deputy mineral surveyors come within purview of said Sec. 452, R. S. U. S.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN APPLYING THE DOCTRINE OF "OFFICE FOUND" IN THIS CASE.

That this doctrine should not be applied to the "Bon Voyage" location is demonstrated by:

- (a) The alien cases;
- (b) Cases arising under the National Banking Acts;
- (c) Foreign corporation cases;

(d) Cases arising under *ultra vires* acts of corporations;

(e) Cases arising under the Indian Reservation Acts;

(f) The Deputy Mineral Surveyor cases.

If it be admitted that Whittren as a deputy mineral surveyor is subject to the loss of any location made by him while such surveyor (which we will concede temporarily for argumentative purposes), yet under the principles of the foregoing cases, no such loss could be asserted except in a proceeding under proper process and pleading where the Government is a party.

(a) *The Alien Cases.*

The case at bar was a purely possessory action between two individuals and not a patent proceeding, and the principle of the alien cases, so-called, was peculiarly applicable therein.

Section 2319, R. S. U. S., declares that only *citizens* and those who have declared their *intention* to become such shall locate the public mineral lands.

Notwithstanding the terms of the statute the Supreme Court has decided in two cases,

Manuel vs. Wulff, 152 U. S., 505;

McKinley Creek Mining Co. vs. Alaska United M. Co., 183 U. S., 563,

that if some person not a citizen locates, no one can question the validity of the location but the Government.

Says this Court in the last case cited:

"The meaning of *Manuel vs. Wulff* is that the location by an alien and all the rights following from such location *are voidable and not void and free from attack by any one except the Government.*"

This rule of law has long been established by the Federal Courts and courts of last resort.

Shea vs. Nilima, 133 Fed., 209, 215;
Tornanses vs. Melsing, 109 Fed., 711;
Lone Jack M. Co. vs. Megginson, 82 Fed.,
 89;
Billings vs. Aspen M. & S. Co., 52 Fed., 250;
Holdt vs. Hazard, 102 Pac., 540.

See also,

Shamel on Mining, Mineral & Geological Law, 108;
Morrison's Mining Rights, 13th Ed., 308;
Lindley on Mines, Vol. 1, Sec. 233;
Martin's Mining Law, Sec. 98;
Costigan on Mines, Sec. 263;
Ricketts on Mines, Sec. 163-3.

Wherein does the distinction lie between an alien qualified and a citizen disqualified? Should a

harsher rule be invoked by the Courts as against a citizen than is invoked by the Government against an alien? Manifestly the United States extends its invitation to locate mineral lands to qualified citizens and inchoate citizens only. It reserves the right to prevent its bounty going to unqualified locators by proceedings on "office found." But it does not lie in the mouths of those who are desirous of being recipients of the bounty of the United States, both alien and citizens, to use the Courts as an instrument to usurp this right of the Sovereign. In such event we should have a location held void as to a disqualified citizen and valid as to a disqualified alien. *Non constat* this very condition may have been shown to exist here, if the Government had been a party to the proceeding. No question of citizenship of the parties, however, would have been permitted to be raised in this case under the pleadings therein or under the principle of the alien cases.

Is it not a *reductio ad absurdum* for the Court to so construe section 452 in a proceeding where the Government is not a party as to deny to a qualified citizen suffering from the inhibition of the statute the right to hold a mineral location, and yet to permit the *alien* suffering also from an express inhibition to *hold* such a location until the Government shall question it?

"Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation

leading to hardship and injustice if any other interpretation is reasonably possible."

St. Louis & Iron Mountain Ry. Co. vs. Taylor, 210 U. S., 295.

In the case of *Billings vs. Aspen Mining & Smelting Co.*, 52 Fed., 251, the Circuit Court of Appeals quotes approvingly the language of this Court in the early case of *Gouverneur vs. Robertson*, 11 Wheat, 332, where in discussing the policy that permits an alien to hold real estate until office found, it is said:

"It no doubt owes its present authority, if not its origin to a regard to the peace of society, and a desire to protect the individuals from arbitrary aggression."

If to disturb the possession of an alien locator is arbitrary aggression, certainly an interference with the right of a citizen holding and possessing a valid location, may be also deemed an arbitrary aggression where such interference is based on the ground that he is suffering from a disqualification such as the one complained of here.

The rule of the peace of society is as applicable in the one instance as the other.

(b) *Cases arising under the National Banking Acts.*

There is a line of cases decided by the Supreme

Court of the United States in which the principle controlling in the alien cases has been adopted and applied. We refer to those cases arising under the laws of the United States relative to the powers of the National Banks. In many of these cases, the banks have taken certain securities in the ordinary course of business in direct violation of the provisions of the Act of Congress.

But has this Court declared such securities void? On the contrary, it has uniformly held such securities enforceable by the banks, when their validity has been questioned by private persons, holding the same voidable and then *only at the instance of the Government on office found*.

National Bank vs. Matthews, 98 U. S., 621, 627;

Oates vs. National Bank, 100 U. S., 239, 249;

National Bank vs. Whitney, 103 U. S., 102-3;

Reynolds vs. Bank, 112 U. S., 405;

Schuyler National Bank vs. Gadzen, 191 U. S., 451.

The early case of *National Bank vs. Matthews*, 98 U. S., 621, 627, is a leading case upon the point.

The National Banking Act provided that the banking association created thereunder might purchase, hold and convey real estate for certain purposes and no others. It further provided for the acquisition by the banking associations, of land at

judgment sales and by several other methods, but especially prohibited the holding of any real estate under mortgage. Notwithstanding the prohibition of the statute, the Union National Bank of St. Louis took a mortgage upon certain real property to secure future advances. Upon an action brought to enjoin the sale by the bank under said mortgage, the power of the bank to accept such security was assailed and the contract alleged to be void. But this Court in holding the bank's power could not be attacked collaterally said:

"The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decisions. . . . Where a corporation is incompetent to take a title to real estate, a conveyance to it is not void, but only voidable, *and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose*" (pages 627-8). (Italics ours.)

There is a complete line of decisions of this Court based upon the foregoing authority, down to that of the case of *Schuyler National Bank vs. Gadsen*, 191 U. S., 451, where this Court, in approving the doctrine of *National Bank vs. Matthews*, *supra*, says:

"It is no longer open to controversy that the provisions of the Statutes of the United States forbidding the taking of real estate security by a National Bank for a debt coincidentally contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery but simply subject the bank to be called to account by the Government for exceeding its powers" (page 458).

(c) *Foreign Corporation Cases.*

The same principle is involved in another class of cases decided by this Court wherein foreign corporations being forbidden to do business in a State or acquire property therein until they have complied with certain statutory requirements, violate the law in this respect.

In such cases this Court has uniformly held that in the absence of any provision of the statute declaring contracts made in violation of the statute void, that no one can question their validity except the sovereignty on direct proceedings instituted for that purpose.

Fritts vs. Palmer, 132 U. S., 282;
Seymour vs. Slide, 153 U. S., 523.

The case of *Fritts vs. Palmer*, *supra*, is one much cited in the books.

There the question was whether a deed for real estate in Colorado made to a Missouri corporation organized to do business in the former State, but which had not filed in the office of the Secretary of State its articles of incorporation, was absolutely void, passing no title to the grantee. The statutes of Colorado had provided that no foreign corporation should purchase or hold real estate in the State unless in the manner provided by the Colorado laws, and further provided that upon failure to comply with the provisions relative to the filing of its articles, that each stockholder and officer should be liable jointly and severally on all contracts of the company while it was so in default.

This Court construing this section said:

"The question whether a corporation having capacity to purchase and hold real estate for certain defined purposes or in certain quantities has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, *concerns only the State within whose limits the property is situated. It can not be raised collaterally by private persons unless there is something in the statute expressly or by necessary implication authorizing them to do so.*" (Italics ours.)

In thus holding, this Court based its decision upon the fact that the principle involved was analogous to that raised in the alien cases, the National Banking cases and those cases arising out of the

ultra vires acts of domestic corporations, in all of which it has been decided that only the Government can complain.

(d) *Cases Arising Under Ultra Vires Acts of Corporations.*

Similar to the foregoing cases are those expressly cited by the Supreme Court in support of the reasoning in the case of *Fritts vs. Palmer*, *supra*, wherein corporations organized to do business under State laws are authorized by the statute to hold only a limited amount of real property.

This Court has settled the law that where a corporation violates the statute in this respect, no advantage of the fact can be taken by a private individual; that only the sovereignty can complain.

Cowell vs. Springs Co., 100 U. S., 55, 60;

Jones vs. Habersham, 107 U. S., 174;

Blair vs. City of Chicago, 201 U. S., 450-1.

(e) *Cases Arising Under Indian Reservation Acts.*

There is finally one other class of analogous cases involving the throwing open of certain lands of the United States theretofore reserved to Indians, such lands to become open to settlers on a certain day at an hour stated; and wherein the proclamation of the President declaring such lands open to settlement contains an *express prohibition* against sooner entry

under penalty of loss of power to acquire any right to said lands.

Notwithstanding such prohibition, this Court has upheld locations made by individuals who violated the express provisions of the statute by entering before the hour stated, and held that where the entry of one disqualified was valid on its face, no one but the Government through its land department could question the entry.

McMichael vs. Murphy, 197 U. S., 304;
Hodges vs. Colcord, 193 U. S., 192.

A case strongly in point as illustrative of this principle is that of *McMichael vs. Murphy*, *supra*, decided by this Court a few years ago.

In that case the President under the Indian Appropriation Act of 1889, issued a proclamation declaring that certain lands on and after noon of April 22nd, 1889, *and not before*, should be open for settlement, etc., and further on in said proclamation used the following language: "Warning is hereby again expressly given that no person entering upon and occupying said lands before said hour of April 22, 1889 . . . will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provisions of the Act of Congress to the above effect" (26 Stats., 1544, 1546). A man named White did enter

and occupy *before* said time, in direct violation of both the Act of Congress and the President's proclamation; he, White, thereafter made an entry thereof in the Land Office. Subsequently, one McMichael entered the same land, and on contest for it the Court said as follows:

"Following the adjudged cases, we hold that White's original entry was *prima facie* valid, that is, valid on the face of the record, and McMichael's entry, having been made at the time when White's entry remained uncanceled or not relinquished of record, conferred no right upon him for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. Upon White's relinquishment they again became public lands, subject to the entry made by Murphy."

To the same effect, that no rights can be incepted by a third party to land covered by a homestead entry, made by one disqualified in fact, until after such original entry is declared void by competent authority, is the case of *Hodges vs. Colcord, supra*.

We also cite to the Court the following authorities from the Circuit Courts of Appeal and the courts of last resort of the various States, in which the said doctrine laid down by this Court is adopted and followed in analogous cases:

Webber vs. Spokane, etc., 64 Fed., 208;
Sanders vs. Thornton, 97 Fed., 863;
Brown vs. Schlerer, 118 Fed., 987;
Blodgett vs. Lanyon Zinc Co., 120 Fed., 893;
Waterbury vs. McKinnon, 146 Fed., 737-9;
Dunlap vs. Mercer, 156 Fed., 545;
Newchatel vs. New York, 49 N. E., 1043;
Ledebuhr vs. Wisconsin Trust Co., 88 N. W.,
 607, 609;
Meyers vs. Campbell, 44 Atl. (N. J.), 863;
Camp vs. Land, 122 Cal., 167.

The case of *Sanders vs. Thornton, supra*, while involving a somewhat different state of facts, is very pertinent. It appeared therein that a citizen of the United States, contrary to the statute, had knowingly purchased certain lands of a Cherokee Indian situate on the Cherokee domain, inducing the latter to use his name and hold the lands in trust, to evade the statute. Upon a suit in unlawful detainer, the point was made that such a purchase being in violation of the law was void, and an instruction to that effect was asked.

The Circuit Court of Appeals for the Eighth Circuit, in holding that such a purchase was not void, said:

"If the defendant was a citizen of the United States and for that reason was not entitled to hold lands and improvements thereon in the

Cherokee Nation, these facts alone would not entitle the plaintiff to recover, as the instruction asked broadly asserts. Several other things would have to occur to entitle the plaintiff to oust the defendant. These facts might entitle the sovereign to oust the defendant but, *if the defendant was not entitled to hold lands or improvements thereon in the Cherokee Nation that is no concern of the plaintiff, and he can not profit by it in this action. The Sovereign alone, either the United States or the Cherokee Nation has the right to oust him of his possession or occupancy on that ground.*"

(f) *The Deputy Mineral Surveyor Cases.*

The cases in which the question as to whether or not a deputy surveyor can make a mineral location, so far as court adjudications are concerned, consist of but two, one decided by the Utah Supreme Court adversely to such right (*Lavignino vs. Uhlig*, 71 Pac., 1047), and one in favor in Nevada (*Hand vs. Cook*, 92 Pac., 3).

Other cases have been decided by the Land Department.

It would be needless to enter into an exhaustive examination of these Land Department decisions. Lindley in his work on mines (2nd Ed., Vol. 2, Sec. 661) sums up the status of that Department thereon as follows:

"The Land Department at one time held that

they (deputy mineral surveyors) were not prohibited from making mineral entries within the district for which they are appointed. By subsequent rulings it was determined that they came within the inhibition of section 452 of the Revised Statutes, and were prohibited from entering or becoming interested in any of the public lands of the United States. The latest expression by the Department on the subject has a tendency to suggest the incorrectness of these later rulings. The existing Land Department regulations seem to limit the disqualification of the deputy surveyor to the making of surveys or mineral claims in which he holds an interest thus intimating that he may lawfully locate and hold a claim but could not survey it for patent."

The latest ruling of the Department prior to the decision in the case of *Seymour vs. Bradford*, 37 Land Dec., 61 (revoking the appointment of Bradford as a deputy mineral surveyor because of his violating the provisions of the statute), is the case of *W. H. Leffingwell* (30 Land Dec., 139). This case shows the unsettled condition of the Land Department decisions upon this point. There it was held that where a deputy mineral surveyor who has no interest in a mining claim at the time he surveys the same nor at the date of the application for patent, but who subsequently makes entry thereof, does not come within the spirit of section 452 prohibiting employees of the General Land Office from "pur-

chasing or becoming interested in the purchase of public land."

Up to 1898 no doubt was expressed by the Land Department as to the right of a deputy mineral surveyor to make a mineral entry. It had rendered two decisions to the effect that he had such right.

In re Loch Lode, 6 Land Dec., 105;

Dennison vs. Willitts, 11 Land Dec., 261.

In a case reported in 26 Land Dec., 122, 136 (*Floyd vs. Montgomery et al.*), these decisions were reversed, the Department holding that a mineral surveyor was prohibited by the Statute from making such entry. In 1900 this latter rule was again reversed in effect, for in the *Leffingwell* case the Department held that where the mineral surveyor had no interest in the claim at the date of the making of the survey and the application, he might make an entry thereof subsequent.

Naturally in these Land Department cases, conflicting as they may be, the Government is a party, so that no criticism may be made of such decisions, as is made with reference to the two cases cited in Utah and Nevada, and in the decision of the Circuit Court of Appeals herein, that no one of them constituted a proceeding involving a question of "office found."

The case of *Lavignino vs. Uhlig* was carried to this Court, but a decision of the question in con-

troversy here was held not to be necessary in deciding the case (198 U. S., 443).

We have then no further express decisions save the one of *Hand vs. Cook*, the decision on review here, and the Land Decisions.

The sentiment underlying the attitude of the courts toward the decisions of the Land Department is lucidly expressed in the case of *United States vs. Moore*, 95 U. S., 760, 763, where the Court says:

"The construction given to a statute by those charged with the duty of executing it, is always entitled to *the most respectful consideration, and ought not to be overruled without most cogent reasons.* . . . The officers are usually able men, and masters of the subject; not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

But again says the Court:

"*It is only when those officers have misconstrued the law, applicable to the case, as established before the department, and thus have denied the parties rights which, upon a correct construction would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can in a proper proceeding interfere and refuse to give effect to their action.*"

Quinby vs. Conlon, 104 U. S., 420, 426.

See also,

Hastings & Dak. R. R. Co. vs. Whitney,
132 U. S., 357, 366.

In the early case of *United States vs. Dickson*, 15 Pet., 161, the Treasury Department had for more than *twenty years* placed a certain construction upon an Act of Congress. This Court declined to follow the construction, saying:

"The construction so given by the Treasury Department to any law affecting its arrangements is certainly entitled to great respect. *Still, however, if it is not in conformity to the true intendment, and provisions of the law, it can not be permitted to conclude the judgment of a court of justice.*"

The Circuit Court of Appeals in the case at bar, based its decision in part upon the Lavignino-Uhlig case, and in part upon the case of *Prosser vs. Finn*, decided by this Court (208 U. S., 67).

We have no fault to find with the case of *Prosser vs. Finn*, however much we may differ with the conclusion of the Circuit Court of Appeals that a deputy surveyor is an employee of the Land Office of the same status as that of a special agent. A deputy surveyor lacks the first essential of such employment—the rendition of services to the Government for pay from the Government; while a special agent is in the actual service of the United States

receiving his compensation therefrom, the surveyor is in the service of the party who employs him to make a survey and is paid by him alone. He gets nothing from the United States.

That case is an instance of the principle we submit should have been controlling here, for therein the United States was a party to the original proceedings in the Land Office and necessarily with all others bound by its judgment.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN FAILING
TO APPLY THE DOCTRINE CONTROLLING IN THE CASE
OF INNOCENT PURCHASERS.

If the doctrine laid down in the foregoing cases is applicable, and until the Sovereign power acts no one can take advantage of the alleged disqualifications of Whittren, how much more so would this apply to the innocent purchasers from him, in the persons of Eadie and Waskey. Eadie bought a half interest from Whittren in 1905 (fol. 88), and thereafter they joined in a lease to Waskey of a portion of the ground (fol. 10), and Whittren made a subsequent lease of the remainder of the ground to Waskey and Eadie (fol. 13), who in good faith continuously worked the ground thereunder (fol. 91).

By the action of the lower Court all rights of these innocent parties are ignored.

In the opinion of the lower Court a title incepted wrongly is forever incapable of being "cured." Therefore these innocent purchasers had no rights in the ground and punishment is dealt out to them although the statute under which the decision is rendered fixes but one penalty, and that is the *viola-tor be removed from office.*

The statute says he who *directly* or *indirectly* purchases. Therefore in the opinion of the lower Court a secret location in favor of a deputy mineral surveyor would be void, and if void, innocent purchasers for value would have their investment confiscated, *not* by the Government, who would deal equitably, but by the individual who "jumps."

To illustrate, suppose Whittren had been employed by Chambers to locate mines in Whittren's name. Chambers was a mineral surveyor; Whittren was not. Chambers desires the mine. Whittren does locate it and Eadie and Waskey purchase from Whittren without any knowledge that Whittren is acting for Chambers, a deputy mineral surveyor. The innocent purchasers for value (when the secret is exposed that Whittren is acting for Chambers, the deputy mineral surveyor), lose their purchase. Can that be law?

Certainly the United States Government never intended to pass a law that the property of the innocent should be forfeited and confiscated?

The situation is somewhat akin to a vendor's lien.

Still the vendor has no lien against an innocent purchaser.

Bailey vs. Greenleaf, 7 Wheat., 46.

There is no record open to the public of the appointment of Chambers as a mineral surveyor. There is nothing to notify the public not to deal with Chambers. If there was a record that Chambers was a mineral surveyor, Chambers has conspired with Whittren to locate secretly and therefore the public had no notice. Remember, the statute all the time is in words that the punishment shall fit the crime, i. e., that the person who violates "shall forthwith be removed from his office."

Look at the facts for a moment. It is conceded by the Circuit Court of Appeals that the original location of Whittren while slightly in excess of twenty acres was valid. He had conformed to the statute in the two essential requirements, viz: made a discovery and marked his boundaries so that the location could be readily traced. No notice is required to be recorded by the laws of Alaska.

Sturtevant vs. Vogel, 167 Fed., 448.

The location was then complete.

Erwin vs. Perigo, 93 Fed., 608.

The fact that the claim exceeded in area the statutory amount simply rendered that *excessive area* void.

Price vs. McIntosh, 121 Fed., 716;
Zimmerman vs. Funchion, 161 Fed., 859;
Hammer vs. Waskey, 170 Fed., 31;
Richmond vs. Rose, 114 U. S., 576.

And even as to this void excess Whittren had the sole and first right to say where and how he should cut it off. He was not compelled to cast it off until some one had complained and then could use his judgment as to what portion should be eliminated.

Price vs. McIntosh, supra;
Zimmerman vs. Funchion, supra.

After having been in possession of his valid location for a year and a half, Whittren decided to survey it. In drawing in his lines in an honest endeavor to comply with the law, he excluded the point within his original stakes at which he had made a discovery. No one had questioned his excess. He found he had too much, and adjusted the lines in a manner to give him the legal quantity of ground and at the same time be a satisfactory area to himself and in so doing, according to the decision of the Court below, placed himself outside the law, as he was then a deputy surveyor, having been appointed between the time of making his first discovery and this innocent readjustment of boundaries. At this time he panned within these readjusted boundaries and found gold.

Subsequently, Eadie and Waskey having no means

of knowing, constructively or otherwise that the location had been invalidated by the endeavor to comply with the law, innocently purchased and in good faith proceeded to develop the ground.

Furthermore the United States has provided no means of declaring to the world that such a location is *void*. The language of the statute on its face, interpreted in the light of the decisions of this Court upon questions of statutory construction, would hold to the contrary.

Assuming then that a deputy surveyor is within the provisions of section 452, and that Eadie and Waskey had knowledge of that fact, by a *presumed* knowledge of the existence of the statute, what conclusions could they arrive at as to the penalty to be derived from the working of such a location by him? Does the statute say that any such location shall be *void*? No. It says that the persons therein named are "prohibited from purchasing" any of the public lands, and if they violate the statute, *they shall forthwith be removed from office*.

"Where a statute specifies the effect (of a violation) of a certain provision, courts will presume that *all* of the effects intended by the law maker are stated."

Sutherland on Statutory Construction, Sec.
324.

"Where a statute specifies the effect of a certain provision *other effects are to be held excluded.*"

Endlich on Interpretation of Statutes, Sec. 397.

"Where the law maker assumes himself to set out the consequences of disobedience to the law, no other consequences can be logically or fairly considered as coming within the scope of his intention. If he attempts to set out such consequences, he must be presumed from the very nature of the thing *to intend to complete his work and not to leave it unfinished.*"

Bird vs. Pennison, 7 Cal., 308.

The law seems to be well settled that where a statute creates a new offense, and announces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can only be that which the statute prescribes.

Sutherland on Statutory Construction, Sec. 327;

Endlich on Interpretation of Statutes, Sec. 397.

Says this Court in *Fritts vs. Palmer*, *supra*:

"So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the State

before acquiring the right to do so, is found in section 262 of the same chapter. . . . *The fair implication is that in the judgment of the Legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State. It is not for the judiciary at the instance or for the benefit of private parties claiming under deeds executed by the persons who had previously conveyed to the corporation according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting for the benefit of such parties the estate thus conveyed to the corporation and by it conveyed to others.*"

Says the Circuit Court of Appeals for the Eighth Circuit, in *Dunlap vs. Mercer*, 156 Fed., p. 545.

"The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and *that statute prescribes other specific penalties it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the law making power.*"

If then these innocent purchasers were assumed

to know the law, no other conclusions could have been arrived at by them than,

(1) Assuming that loss of employment was specifically named as a penalty in the statute, the courts could prescribe no further penalty;

"On what principle of law could this court add another to the penalties prescribed by the law itself?"

De Wolf vs. Johnson, 10 Wheat., U. S., 392.

or

(2) If loss of employment (the consequence provided by the statute) was not to be regarded as the exclusive penalty, and the courts could by construction assume that Congress designed a further penalty, there could be none greater than by making the location voidable, and that under the rules laid down by this court in the cases cited under our first point could only be at the instance of the sovereign power. Subject to such possibility alone, Eadie and Waskey may be said to have purchased.

There had been no adjudication upon the point by this court, and conceding that these grantees would be assumed to know the law, the natural deduction they would draw would be in line with the alien cases and the other analogous cases cited; that only the government could complain, and that the

location could not be the subject of collateral attack by a private individual.

This would seem to be the conclusion of Costigan as expressed in his work on mining law, page 170, wherein, commenting upon the two cases cited and emphasizing this doctrine of innocent purchasers he says, referring to *Lavagnino vs. Uhlig* (71 Pac., 1046):

" . . . This is but a state decision for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location. The whole tenor of the Utah decision is that the location by the deputy mineral surveyor is absolutely void, *whereas the protection of innocent purchasers requires that a rule like that applicable to locations by aliens be applied*. It is upon this ground only that a recent Nevada decision upholding a location by a deputy mineral surveyor can be supported. While the court seems to have been in error in the last-mentioned case in saying that deputy United States mineral surveyors are not covered by the above-mentioned statute, *nobody but the government could possibly object to a location by a deputy mineral surveyor*, and the court was therefore right in its decision, but erred in the reason given for it."

Presumption is Discovery Extends Throughout Location.

There is still another proposition involved here that the court below lost sight of and that is the presumption that when discovery is made and boundaries marked, that the mineral extends throughout the length and breadth of the claim, validating every portion thereof. Too much stress is laid upon the fact that Whittren left his point of discovery outside of his readjusted lines.

He never intended to abandon his discovery when he surveyed the claim and drew in the lines in order to obey the law. His ground was in the midst of and lying over a great gravel deposit and the continuance of that gravel with the auriferous minerals therein from the hole in which he found the gold in 1902 throughout the entire claim was to be presumed under the decision of the courts.

When one has discovered a lode upon the unappropriated public domain and has within the proper time in good faith, performed all of the subsequent acts essential to a valid location, as provided by law, he is entitled to the presumption that his lode extends through the full length of the claim.

Armstrong vs. Lower, 6 Colo., 393;

Patterson vs. Hitchcock, 3 Colo., 533.

And it has been held by this Court as well as by the Circuit Court of Appeals that in deciding whether a discovery has been made or not the fact that the location lies in close proximity to other

claims whereon minerals have been developed is a factor that may be taken into consideration.

Erhardt vs. Boaro, 113 U. S., 536;

Lange vs. Robinson, 148 Fed., 799;

Shoshone vs. Rutter, 87 Fed., 807.

The record shows that the "Bon Voyage" was surrounded by mineral bearing claims, namely the "Golden Bull" and others.

Applying this same doctrine to this placer claim, why should not the presumption attach that these auriferous gravels extend throughout the length and breadth of the claim?

Where the locator of a mining claim extends or changes his boundaries by an amended location, he is not required to make any discovery of ore in the ground so added, as it becomes a part of the original claim and is validated by the original discovery,

Tonopah & Salt Lake Min. Co. vs. Tonopah Min. Co., 124 Fed., 389.

In the case of *Little Pittsburgh Consolidated Min. Co. vs. Amie Min. Co.*, 17 Fed., 57, where it was held that after a mining claim has been validly located the owner of it may sell any part of it without prejudice to his right to hold the remainder, Judge Hallett said with reference to the fact that the por-

tion disposed of included the discovery point on the location:

"The position taken appears to be to the effect that one who owns a mining claim must at all events hold on to his discovery shaft until he has obtained a patent for his claim. If he yields it to another in any way by conveyance or otherwise, he thereby abandons the rest of his claim. I do not see upon what principle such a conclusion can rest. *After the claim has been properly located the owner of it may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him.*"

In the case of *Silver City Gold & Silver Min. Co. vs. Lowrie*, 57 Pac., 11, the Supreme Court of Utah, commenting on this decision of Judge Hallett, said:

"If a mining claim is, as in practice most of them are, held by tenants in common, under the laws of most if not all of the mining States they may petition for partition. If upon partition of a claim a portion should be set off to one of the parties on which the original discovery was not located, under the rule insisted upon by appellants, he would lose all of his rights, notwithstanding the lode might exist, and have been developed and worked through the whole length of the claim. The cases upon which the appellants rely do not sustain their contention, because the facts involved in them were radically different from the facts in the case at bar. Chief

Justice Waite indicates in the case of *Gwillim vs. Donnelan, supra*, that if it had appeared that a discovery had been made at any place on the defeated claim, other than the original discovery which was within the patented ground, the right to the portion of the ground outside of the patent would not have been lost."

And again says the Utah Supreme Court in the same case:

"The Land Department holds that where a portion of a claim embracing the original discovery is lost or is waived or omitted from the application, a patent will be issued for the balance, provided that the vein has been discovered and developed on the portion of the claim not omitted (Secretary Teller to Commissioner, 1 Land. Dec., Dept. Int., 593). The Commissioner of the Land Department having asked the Secretary this question: 'Did the waiver of the discovery shaft and the portion of the lode within the Kangaroo survey by failure to adverse the claim have the effect to vitiate the entire Metropolitan location and bar an application for any part of the same?' The Secretary in answer said, 'On the first point I am of the opinion that the development and possession of the lode so far as it runs upon public land, was not interfered with in any manner by the waiver of a portion even though the original discovery shaft was included in the portion disposed of. The continued possession and working of such outside portion under the original ownership

and location ought not to be held as forfeited while the good faith of the owner towards the United States is not impaired; *and opportunity should not be given to a stranger to appropriate under United States laws the property and improvements which he has acquired and made upon a good and sufficient location properly asserted by him, at the time of the original discovery.* Section 2326 of the Revised Statutes recognizes portions of claims as entitled to patent, and the issue of separate patents on such portions as adverse parties may rightfully possess. Assignment of any interest whatever on these mining possessions has been declared valid by the Supreme Court even by a parol transfer without a written instrument. If the existence of the lode be shown beyond the lines of the conflicting survey, and application be made for patent, it would seem to work a complete abrogation of a property and statutory right to deny a patent thereon because of a sale or surrender of some other portion of the lode originally embraced in the discovery and location.' See also *Spur Lode*, 4 Land Dec., 160; *Cayuga Lode*, 5 Land Dec., 703."

In Alaska there is no provision for a discovery shaft as a condition precedent to the completion of a valid location as is the case in some of the States and Territories. The loss of this original hole then was immaterial. Whittren made a discovery within the limits of the claim as originally located. The location when completed vested in him a right to

the exclusive possession of the entire location as against everybody but the Government and until he learned that he had included an excessive area and then it was void only as to the excessive area.

Suppose that upon an action brought to settle the right of possession of a mining location where the discovery point was near the outer boundaries of the claim over which a subsequent locator had laid his lines, the Court finds the area excessive and the original discoverer entitled to only the statutory amount, the balance of his claim covering his discovery point being awarded to his adversary, the subsequent locator, would the remainder of the original claim be held void for lack of discovery, the locator having done no work showing that there was mineral in the claim? On the contrary would not the presumption that the mineral extended throughout the limits of the claim by reason of the original discovery be invoked in favor of its validity?

On the other hand let us assume that Whittren sells a portion of his claim taking in the twenty feet drawn off and including his discovery point. Can it be said because he has thus sold a portion of the ground covering his discovery point that no rights remained in him by reason of the balance of the claim being without such discovery point? We hardly think that it would be so held and in fact Judge Hallett in the case of *Little Pittsburgh Con-*

solidated M. Co. vs. Amie M. Co., hereinabove cited, says that is not the law.

The case of *Gwillim vs. Donnelan*, relied upon by the Circuit Court of Appeals in its decision, does not seem to us to be applicable to the facts here. In *Gwillim vs. Donnelan* there never was in the eyes of the law a discovery by a qualified locator. The discovery was, it was admitted, made upon an adjoining claim and not within the lines of the location staked. Under the statute the first discovery must be within the lines of the location. There was therefore no discovery within the monuments upon *vacant land* upon which to support the location in the *Gwillim vs. Donnelan* case. Here there was undoubtedly a valid location made, based upon sufficient discovery *within* the lines of the location.

If Whittren before he surveyed the ground had disposed of the claim he would have disposed of a valid location, a discovery having been made within the limits thereof. If, called upon as a deputy surveyor to make a survey of the claim he discovered before the year for the doing of the annual assessment work has expired, that the claim was excessive and was directed by the purchaser to draw in its lines to conform to law, and did so draw in the lines in the same manner as was done in this case by excluding the discovery point, can it then be said that it would be incumbent upon the innocent purchasers of the validly located claim, to make another dis-

covery upon their claim within the readjusted lines? or would not the presumption be applied that once validated by discovery such validity could not be removed by an exclusion of a small hole in the ground wherein gold had been originally discovered? We contend no such unreasonable rule of law as first suggested could be applied to such purchasers and why exercise in favor of subsequent parties a principle which is denied the original locator who has by his energy and enterprise marked out of the public domain a mining claim and perfected the same by discovery; and which is also denied by the decision in this case to those who purchase subsequent to the readjustment of the boundaries as is shown herein. No protection whatever then is afforded to innocent purchasers under this decision although it is well settled that an innocent purchaser may be in a somewhat different position than would be the original locator.

This was early laid down as a matter of mining law by Judge Hallett in the case of *Harris vs. Equator Mining & Smelting Co.*, 8 Fed., 863, where he says:

"It is clear that a *purchaser* may be in a different position from the locator of the claim *not as against the general government with which nothing can avail, but strict compliance with the law regulating locations*, but as against other citizens seeking to locate the same ground. It may

well be said that a purchaser in possession under a conveyance regular in form is in by color of title which in time under the statute of limitations will ripen into a perfect right and it seems reasonable to allow him to maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. In doing so the regulations respecting locations are not at all relaxed nor is any condition on which the estate is held set aside. A presumption is indulged in that the location was regularly made in the first place and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions on failure of which it will be defeated is not controlling. In general we apply to the mines or public lands the rules applicable to real property as that it may be conveyed by deed, is subject to sale on execution as land, descends to the heir of the claimant and not to the personal representative of his estate, and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property."

Under the Alaskan Code a leasehold interest for a period of years is an interest in land or real estate, and if it covers a term of more than a year the conveyance thereof must be in writing.

By section 136, part IV, chapter 15, *Carter's Ann'd Code*, it is provided that "The term 'conveyance'

"as used in chapters 13, 14 and 15 of this title,
"shall be construed to embrace every instrument in
"writing except a last will and testament, whatever
"may be its form and by whatever name it may be
"known in law, by which any estate or interest in
"lands is created, aliened, assigned or surrendered."

Section 135 provides:

"The term 'lands' as used in chapters 13, 14
and 15 of this title, shall be construed as co-
extensive in meaning with 'lands, tenements and
hereditaments,' and the term 'estate and interest
in lands' shall be construed to embrace every
interest, freehold and chattel, legal and equita-
ble, present and future, vested and contingent
in lands as above defined."

Section 181, part V, provides:

"The term 'real property' includes all lands,
tenements and hereditaments and rights thereto
and all interest therein, whether in fee simple
or for the life of another."

Section 1046 of part IV provides:

"No estate or interest in real property other
than a lease for a term not exceeding one year,
nor any trust or power concerning such property,
can be created, transferred or declared otherwise
than by operation of law or by a conveyance or
other instrument in writing, subscribed by the
party creating, transferring or declaring the
same, or by his lawful agent under written

authority, and executed with such formalities as are required by law."

A mining lease moreover is a grant of the mineral in the ground. It is a conveyance of the very substance of the location, subject to an exception of an amount sufficient to pay the royalties thereon to the grantor.

2 *Lindley on Mines*, pp. 1578 to 1581;
Tiffany Landlord and Tenant, 1018;
Gowan vs. Christie, L. R. 2 H. L., Sc. 273,
 284;
Coltness Iron Co. vs. Black, 6 App. Cas., 315,
 335;
Fairchild vs. Fairchild (Pa.), 9 Atl., 255;
Duff's Appeal, Wkly. Notes Cas. (Pa.), 491;
McDonald Stone Co. vs. Stern, 38 So., 641;
Scotch & D. Appeals, L. R. pp. 273, 283,
 284;
Con. Coal Co. vs. Peers (Pa.), 37 N. E., 978;
Hope's Appeal, 3 Atl., 23.

These lessees, therefore, came within the doctrine of innocent purchasers.

The decision in this case by the Circuit Court of Appeals is diametrically opposed to the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Sanders vs. Thornton*, hereinbefore

cited. The principle controlling in both cases is identical. The ground belongs to the sovereignty in each case; certain persons are disqualified to purchase in each case; both violate the provisions of the statute.

"But only the Government can complain," says the Circuit Court of Appeals for the Eighth Circuit, and "any one can complain," says the Circuit Court of Appeals in the case at bar.

We submit that the decision in *Sanders vs. Thornton* exhibits the true rule which should have controlled in this case, not alone as applicable to Whitren as a deputy surveyor, but more strongly so because of the conveyances to the innocent purchasers in this case. If only for the protection of innocent purchasers the investigation into the validity of such a location should be left to the Government, who can afford to be as generous to innocent parties purchasing a mining location as are the courts to innocent purchasers of other kinds of real property.

III.

A DEPUTY MINERAL SURVEYOR IS NOT EITHER AN
"OFFICER, CLERK OR EMPLOYEE" IN THE GENERAL
LAND OFFICE.

Section 452 of the Revised Statutes of the United States upon which is based the grounds for declar-

ing the mineral location in this case void because made by a deputy mineral surveyor, is as follows:

"The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and any person who violates this section shall forthwith be removed from, his office."

This section arises out of the original prohibition against the purchase of public lands by employees in the General Land Office which is found in the Act of April 25, 1812, "for the establishment of a General Land Office in the Department of the Treasury" (2 Stats., 716). By section 10 of that Act it is prescribed that:

"No person appointed to an office instituted by this Act or employed in any such office, shall directly or indirectly be concerned in the purchase of any right, title or interest in any public land either in his own right or in trust for any other person, or in the name or right of any other person in trust for himself, nor shall take or receive any fee or emolument for negotiating or transacting the business of the office; any person offending in the premises against the prohibitions of this Act shall forfeit and pay one hundred dollars and upon conviction shall be removed from office."

Thereafter the Act of July 4, 1836, was passed

"to reorganize the General Land Office" (5 Stats., 107).

It is therein provided (section 14) that:

"All and every of the officers whose salaries are hereinbefore provided for are hereby prohibited from directly or indirectly purchasing or in any way becoming interested in the purchase of any of the public lands; and in case of a violation of this section by such officer, and on proof thereof being made to the President of the United States, such officer so offending shall be forthwith removed from office."

It will be noted that both the Act of April 25th, 1812, and the Act of July 4th, 1836, relate only to the General Land Office at Washington, which is invested with administrative power over the public lands and the officers and employees of that department. These Acts do not include registers, receivers, surveyors general or other local officers of the Land Department which officers had been known to the land system of the United States for many years and with which Congress had been familiar, having provided for the compensation of such officers and the employees therein.

In the provisions of this Act covering the public lands, which we have hereinbefore set forth, it will be seen there is provided for certain officers, clerks and employees, whose salaries and duties are fixed. They are all employed *in the General Land*

Office. That office is at Washington, D. C. For the Circuit Court of Appeals to hold that a deputy mineral surveyor appointed to survey mining claims in the District of Alaska is within the purview of the Act is at the very outset to do violence to its terms. To hold such section so applicable it would be necessary to construe the word "in" as meaning the same as "of," and then to declare that a surveyor appointed to survey mining claims, while not an employee in the General Land Office is an employee "of" that office.

Whatever doubt there might be about the express language of section 452 is cleared by reference to the language of the Act of 1836, which in terms confines the prohibition to those persons drawing *salaries* for duties to be performed within the limits of the *General Land Office* at Washington. It will be noted in section 452 the prohibition is limited to persons "in the General Land Office."

The case of *Hand vs. Cook*, decided by the Supreme Court of Nevada and reported in 92 Pac., 3, in discussing the section in controversy upon the question of its applicability to the deputy mineral surveyor, uses the following language:

"Had the language of section 14 been incorporated into the Revised Statutes without change of verbiage, it is difficult to conceive of its receiving the interpretation given by some of the land decisions to the provisions of section 452

of the Revised Statutes, no matter what that Department may have thought of the wisdom of such construction. The Act of June 27, 1866, 'an Act to provide for the revision and consolidation of the statute laws of the United States' (14 Stat., 74), did not authorize the commission to change the meaning of a statute. The statute provided that 'the commission shall bring together all statutes and parts of statutes which from similarity of subject ought to be brought together, omitting redundant or obsolete enactments and making such alterations as may be necessary to reconcile the contradictions, supply the omissions and amend the imperfections of the original text.' In the case of *Logan vs. U. S.*, 144 U. S., 302, 12 Sup. Ct. Rep., 612, 36 L. Ed., 427, it was held that it is not to be inferred that Congress in revising the statutes intended to change their effect unless an intention to do so is clearly expressed. To the same effect see the cases of *U. S. vs. Ryder*, 110 U. S., 739; *McDonald vs. Hovey*, 110 U. S., 629; *Stewart vs. Kahn*.

It has also been held by the same Court upon numerous occasions that in construing revised statutes where a doubt arises it is admissible to resort to its connection in the Act of which it was originally a part. . . . The same Court has also held that reference to the original statutes can not be had to control the Revised Statutes when the meaning thereof is plain. . . .

"Can it be said that it is plain from the provisions of section 452 of the Revised Statutes that the provisions thereof were intended to ap-

ply not only to the officers, clerks and employees in the General Land Office at Washington, but also to apply to the officers, clerks and employees of the office of the various United States Surveyors General in the various States and Territories? And if it can not be so said will such a construction be aided by a reference to section 14 of the Act of 1836, *supra*? We think it quite clear that if it is a proper case for recurrence to the latter Act to construe the section in question, so broad an interpretation can not be made."

It was some sixty years after the passage of section 452 as embraced in the Act concerning "The General Land Office" that Congress passed section 2319 of the Revised Statutes of the United States. That section provides:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase and the lands in which they are found, to occupation and purchase by citizens of the United States and those who have declared their intention to become such under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States."

Act of May 16, 1872, c. 152 and Sec. 1,
17 Stat., 91.

It was provided by section 2207, embraced within the Act of May 10th, 1872, that the President should appoint surveyors general for certain States and Territories and thereafter a surveyor general for the District of Alaska was appointed by the President in accordance with the provisions of the Act of May 17, 1884, whereby Alaska was made one surveying district.

It is further provided by section 2334, also embraced within the said Act, that

"The Surveyor General of the United States may appoint in each land district containing mineral lands, as many competent surveyors as shall apply for appointment to survey mining claims. *The expense of the survey of vein or lode claims and the survey and subdivision of placer claims into smaller quantities than 160 acres, together with the cost of publication of notices, shall be paid by the applicants and they shall be at liberty to obtain the same at the most reasonable rates; they shall also be at liberty to employ any United States Deputy Surveyor to make the survey.* The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and in case of excessive charges for publication he may designate any newspaper in a land district where mines are situated for the publication of mining notices in such district and fix the rates to be charged by such paper, and to the end that the

Commissioner may be fully informed on the subject, each applicant shall file with the Register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and moneys paid the Register and the Receiver of the Land Office, which statement shall be transmitted with the other papers in the case to the Commissioner of the General Land Office."

In conformity to the provisions of section 2334 giving to the Surveyor General of the United States the power to appoint "as many competent surveyors as shall apply for appointment to survey mining claims," the General Land Department prepared certain regulations which were pertinent to the appointment of such deputy mineral surveyors and these regulations prevailing at the time Whittren was a deputy mineral surveyor, are very lengthy and are set forth in the General Mining Circular of December 18, 1903 (31 L. D., 453, 489; 32 Id., 367).

It will be noted that until the passage of the general mining laws of 1872, which included section 2334, there had never been any such position as that of a United States deputy mineral surveyor. Prior to that time any one claiming a lode and desiring to make a mineral entry had to prepare his own diagram. By the Act of 1872, section 2325, a mineral entryman was obliged to file with his application for a patent "a plat and field notes of the

"claim . . . made by or under the direction
 "of the United States Surveyor General . . . ,
 "showing accurately the boundaries of the claim
 ""

Under the provisions of Section 2334, deputy mineral surveyors who had been appointed and were within the district, were deemed proper parties to make the field notes and plat, and were so designated when the applicant made his entry, but no schedule of fees was fixed by the Government or by any regulation of the Department for the payment of his services in the matter, which were purely a matter of contract between him and the entryman.

As is provided by subdivision 120 of the regulations referred to, neither the Surveyor General nor the Commissioner of the General Land Office has jurisdiction to settle differences relative to the payment of charges for field work between mineral surveyors and claimants. These are matters of private contract and must be enforced in the ordinary manner, i. e., in the local courts.

"120. Neither the Surveyor General nor the Commissioner of the General Land Office has jurisdiction to settle differences relative to the payment of charges for field work between mineral surveyors and claimants. These are matters of private contract, and must be enforced in the ordinary manner, i. e., in the local courts. The Department has, however, authority to investi-

gate charges affecting the official action of deputy mineral surveyors, and will, on sufficient cause shown, suspend or revoke their appointment."

A deputy mineral surveyor has no duties whatever to perform outside of the surveying of the mining claims owned by private parties by whom he is employed. He does no work for the Government. He has no access to the official records of the Surveyor General's Office any further than that which is afforded to any private individual. The statute does not require an oath of office or a bond, although as a matter of Departmental regulation (General Circular, 1903, "93" 31 L. D., 453, 489, 32 Id., 367), a bond and an oath as to the correctness of the surveys so as to ensure the accuracy of the work if possible is required.

The case of *Hand vs. Cook*, *supra*, expresses concisely the character of the duties and obligations of deputy mineral surveyors as follows:

"Deputy mineral surveyors are appointed without limit and for no particular time by the Surveyor General of the United States, under the provisions of section 2334, Revised Statutes, *supra*. They are not required to keep an office in any particular place or at all. They do not remain under the direction or supervision of the Surveyor General. They are not obliged to perform any service either for the government or any individual. They are simply persons who

have been designated as having the requisite qualifications to make a proper survey of mining claims. If they perform any services at all it must be as a matter of private contract between themselves and the mining claimant. They receive no salary or compensation whatever from the Government, nor does the Government supply them with instruments or assistants while engaged in making the mining survey. They have no access to the official records of the Surveyor General's office other than that afforded any private citizen. A deputy mineral surveyor may never make a survey after his appointment or he may make fifty or more in a year. The duties of a mineral surveyor are exclusively professional and in no sense those of a clerk. He keeps no records or accounts. He registers no acts of any superior. He has no custody of public property or papers. His duties consist, when employed by the owner of a mining claim, in making for such owner a survey thereof, showing improvements thereon with preliminary plat and field notes of survey. When the field notes and preliminary plat of survey have been filed with the Surveyor General, his duty in the premises is ended except it be to correct an error made by him."

It is therefore our contention that a deputy mineral surveyor does not come within the provisions of section 452 of the Revised Statutes in that he is neither an officer, clerk or employee of the Government.

(A) *A deputy mineral surveyor is not an "officer" within the provisions of section 452, in that he can not be held to be an officer of the United States.*

"An office is a public station or employment conferred by the appointment of Government. The term embraces the idea of tenure, duration, emolument and duties."

United States vs. Hartwell, 6 Wall., 385.

The case of the *United States vs. Germaine*, 99 U. S., 508, is the leading case on what constitutes a Federal officer, and was relied upon by the Nevada Supreme Court in arriving at its conclusions that a deputy mineral surveyor was not an officer within the meaning of the statute.

In that case the defendant had been appointed by the Commissioner of Pensions to act as surgeon under an Act of Congress known as section 4777 of the Revised Statutes, providing that the Commissioner of Pensions would have the power at his discretion to appoint civil surgeons to make the periodical examination of pensioners which might be required by law, and to examine applicants for pensions, whenever the Commissioner deemed the services of a surgeon necessary. The fee for such examinations is provided by said law to be paid by the agent for paying pensions in the district in which the pensioner or claimant resided out of any money appropriated for the payment of pensions

under such regulations as the Commissioner of Pensions might prescribe.

Germaine was indicted in the District of Maine for extortion in taking fees from pensioners to which he was not entitled, under the provisions of section 12 of the Act of 1825, providing that "every *officer* of the United States who is guilty of extortion under color of his office shall be punished," etc.

In holding that Germaine was not an officer of the United States, this Court uses the following language:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or other of these modes of appointment there can be but little doubt."

And again:

"If we look to the nature of defendant's employment, we think it equally clear that he is

not an officer. In that case the Court said, the term embraces the ideas of tenure, duration, emolument and duties, and that the latter were continuing and permanent, not occasioned or temporary. In the case before us, the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the Commissioner of Pensions in some special case, as when some pensioner or claimant of a pension presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the Commissioner of Pensions, of which we are not advised.

"No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the Commissioner. He is but an agent of the Commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the Commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law

high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this statute."

In the later case of *United States vs. Mouat*, 124 U. S., 303, 307, this Court cites approvingly the case of *United States vs. Germaine* on this point, where it says:

"What is necessary to constitute a person an officer of the United States in any of the various branches of its service has been very fully considered by this Court in *United States vs. Germaine*, 99 U. S., 508. In that case it was distinctly pointed out that under the Constitution of the United States, all its officers were appointed by the President by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President or by one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States."

To the same effect see *United States vs. Smith*, 124 U. S., 525, 532, where a clerk in the office of the Customs was held not to be an officer of the

United States. This Court again reiterates the decision in the *Germaine* case, and says:

"An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of these sources, is not an officer of the United States in the sense of the Constitution. This subject was considered and determined in the *United States vs. Germaine*, 99 U. S., 508, and in the recent case of *United States vs. Mouat*, ante, 303. What we have here said is but a repetition of what was there authoritatively stated."

(B) *A deputy mineral surveyor is not a "clerk in the General Land Office."*

"A clerk is one employed in an office, public or private, for keeping records and accounts, whose business it is to write or register in proper form the transactions of the persons, tribunal or body for which he is clerk."

Bouvier Law Dictionary;

People vs. Fire Commissioners, 73 N. Y., 437, 442;

People ex rel Satterlea vs. Board of Police Comm., 75 N. Y., 38.

It can not be said that a deputy mineral surveyor could come within the purview of the above defini-

tion. He keeps no registers or accounts, he has no custody of papers or property belonging to the public or to any person by whom he is employed. His duties simply consist, when employed by the locator of a mining location, in surveying the claim, in preparing a plat and field notes. When these notes and plat are filed in the Surveyor General's office, all connection with him is ended, unless perhaps to amend any error that he may have made therein. His duties are strictly professional, and in no sense could be deemed those of a clerk, either in or out of the General Land Office.

The New York Charter, section 28, declares that the number and duties of all officers, clerks, employees and subordinates shall be such as the heads of the respective departments shall designate and approve.

It was held in the case of *People vs. Fire Commissioners of City of New York*, 73 N. Y., 437, 442, that:

"In its popular sense 'clerks' denotes those whose duties are clerical and they may be very various. The term does not include every employee and subordinate of the Department. A clerk in an office is defined to be a person employed in an office, public or private, for keeping records or accounts, whose business is to write or register in proper form the transactions of the tribunal or body to which he belongs; and persons employed to assist, as a surveyor in the

execution of the laws regulating the storage, sale and use of combustibles, and assist the fire marshal in the investigations of the cause of fires, are not clerks within the meaning of the Charter. Their duties are not clerical in any sense."

In the case of *People ex rel Satterlea vs. Board of Police*, 75 N. Y., 38, where it was held that a police surgeon is not a clerk or employee within the meaning of the provision of the act supplemental to the New York Charter of 1873, which gives to the Board of Police power to fix the salaries and compensation of all clerks appointed by said board, and of all employees whom they may be authorized to appoint, the New York Court of Appeals, said:

"The second section of the same act confers upon the Board of Police the power to fix the salaries of all clerks appointed by the board and all employees whom they may be authorized to appoint. The designation of 'clerks' and 'employees' is significant and indicates an intention to exclude all other but those named and if surgeons who take an official oath (*Collins vs. The Mayor*, 3 Hun., 681), were intended, it would seem that they should have been designated. Certainly they are not clerks and as employees are usually considered as embracing laborers and servants and those occupying inferior positions, they can scarcely be included in that class of persons. A difference is manifestly made between a clerk and an employee and an officer; and one who does not discharge inde-

pendent duties but who acts under the direction of others is not an officer."

(C) *A deputy mineral surveyor is not an "employee" in the General Land Office.*

While the term "employee" is broader than that of "clerk" it can not be said to cover deputy mineral surveyors in their relations to the Government.

The *Century Dictionary* defines employee to be:

"One who works for an employer; a person working for salary or wages; applied to one so working; but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government or a domestic servant."

While the *Standard Dictionary* defines the term thus:

"One who is employed; one who works for wages or a salary; one who is engaged in the service of or employed by another."

It will be noted that the underlying note of the above definition is "working for salary or wages."

In the case of *McCluskey vs. Cromwell*, 11 N. Y., p. 593, it appeared that one Cromwell contracted with the Canal Commissioners of the State of New York to construct certain locks on the Black River Canal, and in accordance with a statute of New York, executed a bond conditioned that he, his heirs,

executors or administrators would cause to be paid in full the wages stipulated to be paid every laborer employed by him, or his agents, in the construction of the work as often as once a month. In performing the work on the locks, Cromwell entered into a contract with one Shippey, by which the latter agreed to do the masonry on the locks, Cromwell to furnish the foundations necessary and to pay Shippey a specified price per yard monthly as the work progressed. No consent was given by the State or any of its officers to this contract, nor did the State recognize any one but Cromwell in the construction of the locks, or in paying for the work done thereon. The plaintiff in the suit and other persons named in the complaint, were employed by Shippey, who absconded and left them without their wages. They sued and wanted to hold Cromwell liable therefor upon the bond he had executed to the State of New York. The Court of Appeals said, in holding Cromwell not liable on said bond:

"The bond provides for the payment of wages stipulated and agreed to be paid to the laborers employed by Cromwell or his agent or agents, and that upon the failure of Cromwell 'to pay to each and every of the laborers as aforesaid, employed by him, as is herein provided, then each and every of said laborers to whom the aforesaid Cromwell shall then be indebted, may bring an action on this instrument in his or her name pursuant to the provisions of the Act

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executors or administrators would cause to be paid in full the wages stipulated to be paid every laborer employed by him, or his agents, in the construction of the work as often as once a month. In performing the work on the locks, Cromwell entered into a contract with one Shippey, by which the latter agreed to do the masonry on the locks, Cromwell to furnish the foundations necessary and to pay Shippey a specified price per yard monthly as the work progressed. No consent was given by the State or any of its officers to this contract, nor did the State recognize any one but Cromwell in the construction of the locks, or in paying for the work done thereon. The plaintiff in the suit and other persons named in the complaint, were employed by Shippey, who absconded and left them without their wages. They sued and wanted to hold Cromwell liable therefor upon the bond he had executed to the State of New York. The Court of Appeals said, in holding Cromwell not liable on said bond:

"The bond provides for the payment of wages stipulated and agreed to be paid to the laborers employed by Cromwell or his agent or agents, and that upon the failure of Cromwell 'to pay to each and every of the laborers as aforesaid, employed by him, as is herein provided, then each and every of said laborers to whom the aforesaid Cromwell shall then be indebted, may bring an action on this instrument in his or her name pursuant to the provisions of the Act

aforesaid, for the recovery of the amount of such indebtedness.' The referee has found that the plaintiffs and the other laborers to whose claims the plaintiff has succeeded by assignment were employed by Shippey and consequently that they were not employed by Cromwell. Unless therefore the word 'employment' means one thing in the judgment of the referee and another in the undertaking of the parties, the laborers were not employed by Cromwell within the intent of the bond. It is not the labor performed upon the work alone which gives the laborer rights under the bond, but it is labor done in pursuance of an employment by Cromwell—*'to employ is to engage in one's service; to commission and intrust with the management of one's affairs; and when used in respect to a servant or hired laborer, is equivalent to hiring, which implies a request and a contract for compensation, and has but one meaning when used in the ordinary affairs and business of life.'* By laborers employed by Cromwell, mentioned in the condition of the bond, are intended those hired by him, working at his request and under an agreement on his part to compensate them for their services; and employment by Shippey as found by the referee, in this sense excludes the idea of employment by Cromwell. *The Plaintiff and his co-laborers were confessedly the servants and agents of Shippey and could not at the same time and in the same sense, be the servants and agents of Cromwell.* Shippey was indebted to them upon his contract of hiring and there being nothing in this case to take it out of the ordi-

nary rule, it follows that Cromwell was not indebted to them upon the same contract."

Salary as defined in the *Century Dictionary* is:

"The recompense or consideration stipulated to be paid to a person periodically for services; usually, a fixed sum to be paid by the year or quarter."

While wages is defined in the same dictionary to be:

"That which is paid for service rendered; what is paid for labor; hire; now usually in the plural. In common use the word 'wage' is applied specifically to the payment made for manual labor or other labor of a menial or mechanical kind."

A United States mineral surveyor receives no compensation from the United States of any kind or character, neither salary nor wages (Sec. 2334, *supra*, *Hand vs. Cook, supra*). He is therefore not an employee of the Government. Unless the Government is to pay him originally, or to pay him in default of his receiving compensation from the person by whom he is employed, it can not be said that he sustains the relation of employee to the Government.

Says the Supreme Court in *U. S. vs. Meiggs*, 95 U. S., 748:

"It is very difficult to see how this deputy clerk can be called an employee of the Government at all. The Government *was never liable to him for any salary at any time*, and, if the principal clerk had failed to pay him the \$2000 the Government clearly would not have been liable for it."

The same ruling was made with reference to a deputy marshal in the case of *ex Parte Burdell*, 32 Fed., 681, where the Court say:

"Mr. Simmons is chief clerk of the marshal, and is also deputy marshal. He is employed with the other clerks of the marshal, in keeping his accounts with the Government, and the records of the office. His title 'chief clerk' is simply the designation given him by the marshal, fixing his relative position in that office. As with all the other clerks in the office he holds his place at the will of the marshal, was appointed by the marshal, and is paid by him under a private arrangement with him. These clerks have no claim on the Government at all for pay and look entirely to the marshal."

So, too, to the same effect see

Powell vs. United States, 60 Fed., 689, 690.

See also,

People vs. Ahearn, 110 N. Y. S., 306.

In the case of *United States vs. McDonald*, 72

Fed., 898, where a lawyer had been appointed by a district attorney ostensibly as a clerk but to assist him in the duties of his office pursuant to a letter from the Attorney General authorizing such appointment, on condition that the appointee should look solely to the district attorney for his compensation, which was to be paid out of the emoluments of the office, the Circuit Court of Appeals for the Ninth Circuit held that he was not an employee of the United States, Judge Hawley saying:

"The facts of this case present the question whether there is such a privity between McDonald and the Government as to authorize him to maintain an action against the United States for the services rendered by him as clerk in the office of the United States Attorney for the district of Montana. The United States never employed McDonald to perform any services, legal or clerical in their behalf. It is true that the Attorney-General gave authority to the United States Attorney for the District of Montana to appoint McDonald as a clerk in his office, to assist him in the discharge of his duties as district attorney at a named salary, but this authority was given upon the express condition that McDonald 'is to understand that he can have no account against the United States for services but is to look exclusively to the district attorney for his compensation.' This authority is conclusive. Its true interpretation and meaning govern the question."

The idea of continuous service is inseparable from the term "employee." It does not imply occasional services at uncertain intervals. It surely can not be applied to one who neither receives compensation nor renders any service whatever. Under the contention that must be deduced from the ruling of the Circuit Court of Appeals, a deputy mineral surveyor, although he never receives any compensation from the Government, and never performs a service for it, and may make but one contract to survey a location in a year with a private individual, he is still prevented from making a location on the mineral lands of the United States, because he is an employee of the Government.

This differs from the construction placed upon the word "employee" by this Court. In the case of *Louisville, E. & St. L. R. Co. vs. Wilson*, 138 U. S., 501, 505, where it is said:

"The terms 'officers' and 'employees' both alike refer to those in *regular* and *continual* service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an 'officer' nor an 'employee.' They imply *continuity of service* and exclude *those employed for a special and single transaction*. An attorney of an individual retained for a single suit is not his employee. It is true he has engaged to render services, but his engagement is rather that of a contractor than that of an employee."

And again in the case of *Auffmordt vs. Hedden*, 137 U. S., 310, the same rule was applied. There the Court was passing on the status of a "merchant appraiser" who was appointed by the collector of customs under the authority of section 2390 of the Rev. Stats., and whose compensation was payable by the importer. There the Court said:

"The merchant appraiser is an expert, selected as an emergency arises upon the request of the importer for a reappraisal. His appointment is not one to be classified under the civil service law. He is not to be appointed on a competitive examination, nor does he fall within the provisions of the civil service law. He is not a 'clerk' nor an 'agent' nor 'a person employed' in the customs department, within the meaning of section 6 of the Civil Service Act; nor is he an officer of the United States required to be appointed by the President or a court of law or the head of a department. He is an expert selected as such. Section 2930 requires that he shall be a 'discreet and experienced merchant familiar with the character and value of the goods in question.' He is selected for the special case. He has no general functions nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. He is an executive agent, as an expert assistant to aid in ascertaining the value of the goods, selected for the particular case on the request of the importer and selected for his special

knowledge in regard to the character and value of the particular goods in question. He has no claim or right to be designated or to act except as he may be designated."

See also:

Vance vs. Newcomb, 124 U. S., 311;

Pack vs. The Mayor, etc., of New York, 8 N. Y., 222;

Campfield vs. Lane, 25 Fed., 128;

Kelly vs. The Mayor of New York, 11 N. Y., 432;

The People ex rel Peter Morris vs. Randall, 73 N. Y., 416;

Blake vs. Ferris, 5 N. Y., 58.

A deputy surveyor comes in contact with the Land Department only in the special case or cases in which his services have been engaged by intending mineral claimants. He has no access to the records of the Surveyor General's office, the local land office or the General Land Office or the office of the Secretary of the Interior other than those enjoyed by the public generally.

Hand vs. Cook, supra.

He is an outsider. In his practice as a mineral surveyor he may have access to the official plats of survey and other public records which may have any bearing on the case in hand, just as his principal

may have. An attorney practicing before the Land Department has the same opportunity to examine the records of the Department open to the public, having any bearing on the matters concerning his client's case,—yet it can not be contended that an attorney practicing before the Land Department is therefore precluded from exercising the right and privilege of purchasing the public lands. If a deputy mineral surveyor in any wise misconducts himself in his practice before the department, his license or appointment may on cause shown be revoked, as is expressly provided in the regulations hereinabove referred to (paragraphs 118, 119). He is a mere licensee exercising the right given by his license occasionally and at irregular intervals.

It seems to us therefore clear that by any fair interpretation of the terms of the statute, it does not include United States deputy mineral surveyors.

The object of the statute is thus stated by Secretary Noble, in Herbert McMicken's case (10 L. D., 97, 99), cited by the Circuit Court of Appeals in its decision:

“The object of section 452 was evidently to remove from the persons designated, the temptation and the power by virtue of the opportunities offered them by their employment to perpetrate frauds and obtain an undue advantage in securing public lands over the general public by

means of their earlier and readier access to the records relating to the disposal of and containing valuable information as to such lands."

But a mineral surveyor is no more within the prohibition of the statute than is an attorney practicing before the Land Department.

Can he be brought within the prohibition of the statute because to do so will in the opinion of this Court help to suppress the mischief which it is claimed the statute is directed against? This was the position taken by the Secretary of the Interior in the McMicken case cited by the Circuit Court of Appeals in its opinion. He did not pretend to found his decision upon any claim that the words "in the General Land Office" comprehended the office of the Surveyor General in Washington Territory. He said "Officers, clerks and employees in "the offices of surveyors general fall clearly within "the mischief contemplated by the statute and the "reason for the law applies to them with equally as "much force as to those in the central office at "Washington."

The Secretary here recognized that the words of the statute applied only to the clerks, etc., "in the General Land Office" at Washington, but he assumed that he had authority to extend its provisions over other persons "because the reason of the law applies

to them with equally as much force!" A curious rule of construction.

The law is beyond controversy that where a statute plainly points out the persons subject to its provisions no others can by construction be brought within the purview thereof.

"The object of an interpretation and construction of statutes is to ascertain and carry out the intention of the law makers, and when the intention is ascertained, it must always govern. The intention of the legislature must be sought in the statute itself and it is only when the act is of doubtful or ambiguous meaning that the province of construction begins."

26 *Am. & Eng. Ency. Law*, (2nd Ed.), p. 597.

In *Hamilton vs. Rathbone*, 175 U. S., 4217 Brown, J., said:

"The cases are so numerous in this Court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them is quite unnecessary."

The use of the word employee implies the relation of master and servant.

"The relation of master and servant in its full sense invariably and only arises out of a contract,

express or implied, between the master on the one hand and the servant on the other."

Wood on Master and Servant, section 4.

A mineral surveyor can not be said to be equal to such a test so far as the United States is concerned. He has no contract with the government, but he does have a contract of hiring with a mineral applicant; he is therefore the servant of the applicant if any. Since to constitute the relation of master and servant, the actions of the latter must be presumptively or in fact controlled by the former, a contractor who simply undertakes to bring about a result after his own methods, is not a servant.

Bishop on non-contract law, Sec. 602.

Where a contractor to grade a street "agreed to conform the work to such further directions as should be given by the street commissioner and one of the city surveyors," (which is about the same power and authority as is exerted over a deputy mineral surveyor by the Surveyor General or the other officers of the General Land Office), the Court held:

"This clause in the contract does not in any manner affect the case. It does not constitute Foster (the contractor) any more the immediate agent or servant of the defendant than if the provision were not inserted in his contract."

Pack vs. Mayor of New York, supra.

In *Kearney vs. Oakes, et al.*, 18 Canada Sup. Ct., 148, a contractor with the Canadian government for the construction of a government railway being sued for acts performed by him in the execution of said government work, pleaded that he was an employee of the government, and entitled to certain notice as such employee. His services seem to have been analogous to those of a deputy mineral surveyor, viz: to do government work on government land, but he was also paid by the government. But the Court held that employee meant servant and nothing more.

See also

Commonwealth vs. Binns, 17 Serg. & Rawle, 220.

Construing a statute of Indiana giving a lien upon the assets of a corporation in favor of employees, this Court in the case of *Vance vs. Newcomb*, 132 U. S., 220, 233, say:

"It seems clear to us that Vance was a contractor with the company and not an employee within the meaning of the statute. We think the distinction pointed out by the Circuit Court is a sound one, namely, *that to be an employee within the meaning of the statute Vance must have been a 'servant bound in some degree at least to the duties of servant' and not, as he was,*

'a mere contractor bound only to produce or cause to be produced a certain result'—a result of labor, to be sure—but free to dispose of his own time and personal efforts according to his pleasure, without responsibility to the other party."

A mineral surveyor is an independent worker. He accomplishes his duties by the use of his own funds and the employment of expensive instruments and whatever assistants he requires at his own cost. He agrees to produce a certain result, namely, a survey of the location in his own time and in his own way and for a specified sum. He is therefore a contractor only.

From these authorities we maintain therefore it is conclusively shown that Whittren was neither an officer, a clerk, or employee of the United States "in the General Land Office" or elsewhere.

Finally we submit in conclusion that this Court should reverse the decision of the Circuit Court of Appeals affirming the judgment of the Alaska Court,—

1. Because the location of Whittren in 1902 vested in him all of the rights accruing from a valid location, of which he could not be deprived by the casting off of his excessive area.

2. Because the provisions of section 452 of the

Revised Statutes of the United States do not apply to him as a surveyor licensed under section 2334 to make surveys of the mineral lands of the United States.

3. Because assuming this Court holds him to be within the purview of said section 452, the only penalty expressed in the statute for a violation of its provisions is the loss of his license to survey.

4. Because no penalty by way of avoiding the location being prescribed by the statute, such penalty should not be applied to innocent purchasers from him.

5. Because the validity of a location made by Whittren as a deputy surveyor cannot be collaterally impeached but if it is voidable is subject only to direct attack by the government.

For all of which reasons we ask that the judgment of the Circuit Court of Appeals be reversed.

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Of Counsel.



Supreme Court, U. S.
FILED.

NOV 27 1911

JAMES H. McKENNEY,
CLERK.

IN THE
Supreme Court of the United States.
OCTOBER TERM, A. D. 1911.

No. 84

FRANK W. WASKEY, JOSEPH M. CRABTREE, J. POT-
TER WHITTREN AND ANDREW EADIE,
Petitioners.

vs.

JOSEPH HAMMER, OTTO HALLA AND B. SWARZ.

On Petition for writ of Certiorari to the United States Circuit Court of Appeals
for the Ninth Circuit.

BRIEF IN BEHALF OF PETITIONERS.

ALBERT FINK,
Attorney for Petitioners Whittren and Eadie.



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BRIEF IN BEHALF OF PETITIONERS.

STATEMENT OF THE CASE.

(All Italics Ours.)

This was an action of ejectment by defendants in error, plaintiffs below, and hereinafter called plaintiffs, to recover possession of a portion of a placer mining claim, known as "*The Golden Bull*," in conflict with with and overlapping a senior location, known as "*The Bon Voyage*." Plaintiffs claimed title under the junior location, made in January, 1904.

Petitioners, plaintiffs in error, defendants below and hereinafter called defendants, claimed title under the senior location made in January, 1902.

The relative position of the two claims is shown by the map. (Tr., 26.)

The complaint alleged ownership in the plaintiffs by reason of the location of The Golden Bull, ouster by defendants, and sought to recover all that portion overlapping and in conflict with the Bon Voyage.

The defendants, Whittren and Eadie, answered denying the allegations of the complaint and setting up their title to the Bon Voyage.

Waskey and Crabtree answered denying the allegations of the complaint and setting up that Whittren and Eadie, being the owners of the Bon Voyage, under a valid and subsisting location made by Whittren in January, 1902, had executed to them a lease of the premises in dispute, under which they justified their presence and the mining operations they had conducted thereon.

In their reply plaintiffs denied the affirmative matters set up in the answers, and alleged a failure of defendants to perform the annual labor for the year 1903.

Thus there were but three issues presented by the pleadings:

1. Did plaintiffs make a valid location?
2. Did defendants have a prior location?
3. Had this prior location become forfeited by failure to perform the annual labor for the year 1903?

Upon the trial plaintiffs proved a location of the Golden Bull on the first of January, 1904, predicated upon an alleged discovery of *prospects* in 1901; that defendants were in the actual possession, engaged in mining thereon, and rested.

Defendants then proved their prior location—the marking of the boundaries, the posting and recording of a proper notice of location; the discovery of gold, the conveyance of an undivided one-half interest to Eadie and the execution of the leases by Eadie and Whittren to Waskey and Crabtree.

Upon the cross-examination of Whittren, the original locator of the Bon Voyage, it developed that the claim as originally located, was a few feet in excess of twenty acres; that in 1903, *when he was having the annual labor for that year performed*, he surveyed the claim, and in order to make it conform to the size allowed by law, he had drawn in his westerly side line a few feet.

In the drawing in of this line he excluded from the claim the point at which he had made his original discovery of gold.

He made another discovery about the center of the claim shortly thereafter and at the point he had caused the annual labor to be performed. All these events transpired *prior* to the location of plaintiffs.

In 1902, when he made his original location and discovery Whittren was not a deputy United States mineral surveyor, but in 1903, when he caused the annual labor to be performed made his survey and second discovery, he had become such deputy, having been appointed in February of that year.

Defendants having proven their prior location, rested.

It was when the duty of plaintiffs to prove that defendants had failed to perform the annual labor for the year 1903. Instead, plaintiffs moved the court to direct a verdict, because it appeared that after the original location, Whittren had abandoned the *particular spot* where he made his discovery, and that as to the new discovery, this having been made by him after he became a deputy mineral surveyor, the location was void and a nullity.

The court, over the objection of defendants, granted the motion and directed a verdict for plaintiffs, upon which judgment was subsequently rendered and affirmed upon writ of error to the Circuit Court of Appeals for the Ninth Circuit.

It is to review the decision of the Circuit Court of Appeals, affirming this judgment, that this petition for certiorari has been made and allowed.

SPECIFICATION OF ERRORS.

I.

The court erred in sustaining the action of the trial court in granting the motion of plaintiffs to direct a verdict in their favor.

II.

The court erred in sustaining the trial court in holding that the location of the Bon Voyage claim, in January, 1902, was invalid because no discovery of gold had been proven to have been made within the limits of the claim as surveyed in November, 1903.

III.

The court erred in sustaining the trial court in holding that because Whittren, the locator of the Bon Voyage, was a United States Deputy Mineral Surveyor in 1903 he could not thereafter make a valid discovery of gold on the Bon Voyage claim which had been duly and regularly located by him in January, 1902, and before he became a deputy mineral surveyor.

ARGUMENT.

The Circuit Court of Appeals decided:

1. That when Whittren excluded the point of his original discovery it became necessary that he make another discovery within the boundaries as readjusted.

2. That Section 542 of the Revised Statutes prohibited Whittren from making such a discovery in December, 1903.

The reasoning advanced to sustain this position may best be indicated by its reduction to two syllogisms:

I.

EVERY AMENDED LOCATION THAT DOES NOT CONTAIN A
POINT OF DISCOVERY IS INVALID.

THIS AMENDED LOCATION DID NOT CONTAIN A POINT OF
DISCOVERY.

Therefore this amended location is invalid.

II.

NO PERSON DISQUALIFIED UNDER THE LAW CAN MAKE A
VALID LOCATION.

WHITTREN WAS A PERSON DISQUALIFIED UNDER THE LAW.
Therefore Whittren could not make a valid location.

For convenience the argument will be confined to an examination of these two propositions.

IV.

The court erred in sustaining the trial court in holding that a valid location of a placer claim cannot be made by a deputy mineral surveyor.

V.

The court erred in sustaining the trial court in holding that by the exclusion of the original point of discovery by the survey of November, 1903, the entire claim became invalid.

I.

Here the error is in the major premise:

“Every amended location that does not contain a point of discovery is invalid.”

If there be one point settled by the decisions of this court, it is, *that, upon a valid location of a mining claim title vests in the locator to an estate from which he shall not be divested, even by act of Congress.*

“The interest thus acquired is a valuable property right which may be mortgaged, transferred, inherited and taxed. *The right of possession is good against all the world, including the United States.*”

Belk v. Meagher, 104 U. S., 279; 26 L., 735.

Forbes v. Gracey, 94 U. S., 762; 24 L., 313.

St. Louis Mining Co. v. Montana, 171 U. S., 650; 43 L., 320.

Elder v. Wood, 208 U. S., 226; 52 L., 464.

Manuel v. Wulff, 152 U. S., 505; 38 L., 332.

If, then, upon the making of a valid location, *title vests*, how can it be divested except by *consent* of the locator or in consequence of some *condition subsequent* imposed in the grant? Is the grant upon condition that the precise point of original discovery be retained? *Where is this in the statutes?*

How can a right of property in the whole be reconciled with a prohibition against the transfer, relinquishment or abandonment of a part?

The whole doctrine rests upon a misconception of *Gwillim v. Donnellan*, 115 U. S., 45, where defendant,

claiming, under the Mendota, located in November, 1878; was adversed by plaintiff, claiming under the Cambrian, located in May of the same year. The Cambrian was senior to the Mendota, *but was junior to the Fallon*, a third location, which proceeded to patent, including within its boundaries the only point of discovery made upon the Cambrian. The decision proceeded upon the principle that the defendant might have proved that the Fallon was a valid and subsisting location at the time of the attempted location of the Cambrian; therefore the Cambrian location was *never* valid, the only discovery upon which it was predicated having been made *within the limits of another valid and subsisting claim*; that the securing of the patent by the Fallon was a *conclusive adjudication* of such a state of facts; that is that the *Fallon was an older and senior location to the Cambrian*. The court said:

"If there had not been a patent to Fallon it would have been competent for the defendants to prove on the trial that when Thomas (the locator of the Cambrian) entered, Fallon held and owned a valid and subsisting location of the same property and was the first discoverer of the lode, the apex of which was within the surveys of the line of Thomas' claim. Had this been done the location of Thomas would have been adjudged invalid, *because the land on which his alleged discovery was made was not open to exploration, it having been lawfully located and claimed by Fallon*. The admission made by the plaintiff at the trial and on which the court acted in instructing the jury to find for the defendants, is equivalent to *such proof*."

The issue of the patent to Fallon was *equivalent* to a determination by the United States in

an adversary proceeding to which Thomas (the Cambrian) was in law a party; that Fallon had title to the discovery *superior* to that of Thomas and that *consequently* Thomas' location was *invalid*. This barred the right of Thomas to apply to the United States for a patent, and of course *defeated his location*. From that time all lands embraced in his location not patented to Fallon were open to exploration and subject to claim for new discoveries.

The loss of the discovery was a loss of the location."

Certainly *in this case* the loss of the discovery was the loss of the location,—but why? Because the Fallon, being senior, a discovery made within its limits was no discovery, not being upon the unappropriated public domain.

The decision was not because the Cambrian had located and then abandoned the point of discovery, but *because the Cambrian had never made a discovery upon unappropriated lands*.

This was *all* that was decided. The Fallon, being senior to the Cambrian in point of fact, and this having been *conclusively adjudicated* by the issuance of a patent, it necessarily followed that the only discovery made by the Cambrian was upon lands belonging to the Fallon, and was, therefore, in law, *no discovery at all*.

The case is essentially different from what it would have been had the Fallon location been junior instead of senior to the Cambrian.

Had this been the case there would have been a valid location of the Cambrian, a vesting of the estate, a right of possession to the whole, *continuing*

so long as the annual assessment work was performed thereon.

In the case presented, however, there never had been *any location*, for that the *only discovery* was upon a prior valid and subsisting claim.

Because this court has said that a claim was invalid where it had been conclusively determined that there had *never been a discovery upon unappropriated lands*, it is assumed that where there *has been a valid discovery*, which has been relinquished, conveyed, or abandoned, the entire claim is invalidated.

Obviously no such conclusion legitimately flows from the premises, and the distinction between the two cases is too apparent to admit of argument.

PLACERS DIFFER FROM LODE LOCATIONS.

In any event there is an essential and fundamental difference between a placer and a lode location. Whatever reason might be assigned for extending the *supposed* doctrine of *Guillim v. Donnellan* further than the facts of that case in *lode locations*, can find no support when applied to *placers*.

In lode locations the grant is only to those who locate a *vein, lode or ledge*. It is only upon *such location*, that is of a vein, lode, or ledge that the right to the surface is granted.

The rights granted depend entirely upon the ledge discovered and located. The ledge located is the principal thing. The right to the surface, and the unknown, or blind lodes, or ledges apexing inside of such surface lines, extended downward vertically, is

incidental. These rights do not attach upon the marking of the boundaries but only upon the *discovery of the lode*.

As said in Silver v. Lowry (Utah, 1899); 57 Pacific, 13:

"Where the locator allows another to patent the discovery point, which includes all of the known apex of the *only vein discovered*, or by conveyance or otherwise parts with his title thereto, *an entry cannot be made of the residue of the claim*, because proof cannot be made that any vein, or lode, having its apex within the ground sought to be entered exists or has been discovered, and in the absence of such proof there is no basis for any claim either to the surface ground, or a lode vein, or deposit of mineral under the Minings law."

Thus the loss of the main thing, that is, the ledge itself, by patent to another, or grant, or abandonment, might, with some show of reason, be held evidence of an intention to abandon the incidents.

But how different is the location of a placer, *where it is presumed that the auriferous gravels extend through the entire claim*.

It is even provided by statute for the acquisition of those portions of legal subdivisions not in fact mineral.

"Where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as of unsurveyed lands, and where by the segregation of mineral lands in any legal subdivision, a quantity of agricultural lands less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law for homestead or pre-emption purposes." *R. S. 2331.*

So it is provided that when the lands have been surveyed, the location of a placer must conform to legal subdivisions.

"Claims usually called placers * * * shall be subject to entry and patent * * * but where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivisions of the public lands." R. S. 2329.

It is clear Congress intended, upon discovery of placer gold, to grant to the locator the tract appropriated *throughout its entire extent*.

How then can the precise point of discovery be of importance? True, there must be some discovery made, but when once this is accomplished, *title vests in the locator to the entire tract*. By what *legerdemain*, can it be that title to the whole will be divested by loss of *a portion*?

Can it be said that if A locates twenty acres and subdivides it into four tracts he shall lose the balance of his claim by a conveyance of that upon which the discovery was made?

Can it be that if eight persons locate 160 acres, and then divide in equal parts, only he shall have a valid claim who secures that upon which the discovery was made?

Can it be that if eight persons, having located 160 acres sue for partition and the court divides the claim among them in separate parcels, he *only* shall have a valid title who is so fortunate as to secure the precise tract upon which the discovery was made?

If A makes a valid location and conveys or leases a portion other than that upon which he made the

discovery (*something that is done every day*), will his grantee receive nothing?

Can it be that if A makes a valid location and then sells the one acre, or few feet upon which he made discovery, the other nineteen acres, or balance of his claim, will immediately, upon the execution of the deed, become subject to appropriation by others? *Why?*

What public purpose or sound policy is conserved by the imposition of such a restriction upon his right to do with his own as he desires?

It is conceded that, had Whittren done nothing he might have held the *entire claim*. *Will he be stripped of it in his effort to comply with the strict letter of the law?* Suppose while actually engaged in the mining of his claim some person had persuaded him to sell that particular portion where the discovery was made. Can it be possible that such person might then lawfully locate the balance?

Yet all of these seemingly absurd and *unconscionable* conclusions must necessarily flow from the extension of the supposed doctrine of *Guillim v. Donnellan* further than the facts of that case.

There is no distinction between such a relinquishment to an individual, and one to the general Government.

The confusion arises from an effort to regard as *identical* things which are essentially *dissimilar*. A failure to make a *discovery at all* with a *valid discovery* and subsequent transfer of a portion—the location of a specific lode with that of a tract containing auriferous gravels—what is perfectly *reason-*

able in the one case is *utterly without support in the other.*

The loss of the lode is the loss of everything actually located or appropriated. The abandonment of the particular point of discovery in a placer is the loss only of a very small portion of that which has been segregated.

It is admitted that Whittren could have drawn in *any other line of his claim.* Can it possibly be said there is any real supporting reason why he should be prohibited from drawing in this one?

He acted in perfect good faith; he injured no one. Must he lose his claim for that, *not being learned in the law*, he drew in the west side line when he should have drawn in the south end line?

Such contentions render law odious. They sacrifice substance to form.

The doctrine of *Gwillim v. Donnellan* has never been pushed further than the facts of that case.

In *Little Pittsburg v. Amie*, 17 Fed., 57, speaking of this doctrine, Judge Hallet than whom there have been few abler jurists in the mining law said:

"The position taken appears to be to the effect that one who owns a mining claim, must at all events hold on to his discovery shaft until he has obtained a patent for his claim."

"If he yield it to another in any way, by conveyance or otherwise, he thereby abandons the rest of his claim."

"I do not see upon what principle such a conclusion can rest."

"After a claim has been properly located, the owner of it may sell any part without prejudice to his right to hold the remainder."

"He may dispose of it by gift or grant in any way that seems proper to him."

See also:

Silver City v. Lowry (Utah) 57 Pac., 11.

Tonapah v. Tonapah, 125 Fed., 408.

The obvious distinction between the case at bar and that of *Gwillim v. Donnellan* is that in the latter no valid location was ever made, while here the contrary is conceded.

II.

Here the error lies in the minor premise.

"Whittren was a person disqualified under the law."

This is based upon section 452, of the revised statutes.

"The officers, clerks and employes in the General Land Office are prohibited from directly or indirectly purchasing, or becoming interested in the purchase of any of the public lands, and any person who violates this section shall be forthwith removed from his office."

The error is in assuming that a deputy mineral surveyor is an employe of the General Land Office.

As no one will now contend that he is either an *officer* or a *clerk*, and as the learned court below seemed upon an argument that he was an *officer* to regard him as an *employe*, and to affirm the judgment upon this ground, the discussion will be devoted solely to the question as to whether or not he was in fact an *employe*.

An employe is defined as follows:

"One who works for an employer; a person

working for salary, or wages."—*Century Dictionary*.

A deputy mineral surveyor cannot be held within this definition in his relation to the General Land Office. He does not work for it. It is not his employer. He receives from it no salary, or wages, or compensation. He does not even hold his appointment from it.

Deputy Mineral Surveyors are appointed without limit, and for no particular time by the Surveyor General of the United States, under the provisions of Section 2334, Revised Statutes. They do not remain, under the direction or supervision of the Surveyor General; they are not obliged to perform any service either for the Government, or for an individual.

When employed at all, they are employed by the locator of the mining claim in question for the purpose of securing a proper plat upon which to predicate an application for patent. They are hired by such person, work for such person, and are by him compensated. They receive no salary, or compensation whatever from the Government.

His relation to the Land Department is identical with that of a lawyer admitted to practice therein. Just as a locator desiring to secure a patent, or conduct any litigation before the Department must employ some person admitted to practice therein, so the applicant for a patent must employ some person permitted by the Department to make surveys. In each case the services rendered are *purely pro-*

fessional and in the interest not to the General Land Office, but of the particular employer.

It might just as well be held that an *official court reporter* who draws his entire compensation and receives his employment solely and entirely from individual litigants is an employee of the department of justice.

A deputy mineral surveyor owes no higher greater or different allegiance to the General Land Office than a lawyer admitted to practice therein. For malpractice either may be removed, as an official court reporter might be for misconduct.

Nor is this position unsupported by authority. It was expressly so held in *Hand v. Cook*, 29 Nev., 518; 92 Pacific, 3.

It is true a contrary conclusion was reached by the Supreme Court of Utah in *Lavignino v. Uhlig*, 26 Utah, 1; 71 Pacific, 1046, but it is submitted that this decision is based upon no discussion of the subject and assigns no controlling reason as its predicate. It is simply assumed that a deputy mineral surveyor is within the inhibition of the statute.

In *Hand v. Cook*, *supra*, however, the point is examined, the reasons, pro and con, analyzed and discussed.

The decision of this court in *Prosser v. Finn*, 208 U. S., 67; 28 S. C. R., 225, cited by the learned court below, is not in point, for no one could legitimately contend that a *special agent of the General Land Office*, employed by it, and receiving from it his compensation, was *not an employee*.

That the General Land Office has itself concluded

that a deputy mineral surveyor is an employe within the prohibition of the statute is not controlling. The earlier view of the Department was to the contrary and no sufficient reason is assigned for the change of sentiment.

Instructions of Com. of Gen. Land Office,
2 L. D., 313.

Dennison v. Willits, 11 Copps. L. O., 261.

Lock Lode, 6 L. D., 105.

The confusion seems to have arisen from a feeling that in as much as a deputy mineral surveyor owed some kind of duty or allegiance or obligation to the General Land Office, he must of necessity be either an *officer*, *clerk* or *employe*.

Of course no such conclusion legitimately flows from the premises, and as has been pointed out the only duty, obligation or allegiance, due is identical with that of an attorney, and purely professional in its nature.

Certain persons qualified by previous training, profession, ability and good reputation are permitted to prepare papers for applicants for patent and present their causes, certain other persons *deputy mineral surveyors*, by reason of the self same professional qualifications are permitted to prepare *other papers*, the plat, field notes, etc.

The erroneous conclusion finally reached by the Land Department upon this subject had its inception in the case of

Floyd v. Montgomery, 26 L. D., 122.

where the deputy mineral surveyor had himself

surveyed his claim for patent and certified to the amount of labor performed thereon. Under such circumstances it was of course within the inherent power of the department in the proper administration of the land laws to reject the application, until passed upon by some disinterested person.

Yet it was from this decision that the theory was evolved that in no case could a deputy mineral surveyor secure patent. Assuming that because a deputy mineral surveyor would not be permitted to make survey field notes and certificate of amount of labor in his own case, he was therefore an employe, officer or clerk *in* the General Land Office.

Even after the decision of the Floyd case the doctrine was *doubted* by the Secretary in

Leffingwell, 30 L. D., 139, decided in 1900.

So that even if the word *in* as used be changed by the courts so as to make the statute read “* * * employes *of* the General Land Office” there must be still another interpolation “*or any person remotely connected therewith,*” before a deputy mineral surveyor could be legitimately brought within its terms.

Of course so far as the intention of Congress is concerned no one could assign any sound reason why a deputy mineral surveyor should be denied the right to locate and hold a mining claim.

But even conceding for the purposes of argument that a deputy mineral surveyor is an employe of the General Land Office, it does not follow that he is thereby disqualified; the penalty imposed by the

very terms of the statute itself for a violation thereof is removal from office and not *forfeiture of the estate acquired*. Had Congress intended this latter result it must certainly be assumed that it would have been incorporated in the statute.

To hold under the section in question that not only will the employe be removed from office, but that he shall likewise forfeit his estate, is to again incorporate therein *something not put there by the Legislative branch of the Government, and to add another, greater and different penalty than that imposed*.

Nor does it follow, even if it be conceded that Whittren was so disqualified as to prevent him from making a new location after his appointment as a Deputy Mineral Surveyor, that such disqualification prevented him from doing any act necessary to keep alive the location which he had already made and in which he had secured a vested right prior to his appointment as a Deputy Surveyor. The making of a *new location* after appointment is one thing; the doing of acts necessary to keep alive a location already made is *quite another*.

It has *always* been the practice of the Land Department to permit entries to be perfected where the rights had been initiated prior to any relation with the government, even though at the time of the entry the entrymen were in the government service and employed in the general Land Office.

Thus in the case of *Winana v. Beidler*, 15 L. D., 266, where the claimant an employe, of the general Land Office sought entry of a homestead, the right

to which he had initiated prior to his acceptance of employment. It was held:

"In view of these facts I am of the opinion that Section 452 does not apply in this case, for I do not believe that Congress intended by the enactment of said section, *to deprive anyone of valuable property rights theretofore lawfully vested in him simply for the reason that after such person had made settlements on public land and made an entry or application to enter such land, under the Homestead Law, he received an appointment as a copyist in the General Land Office.*"

So it is said in a letter addressed by the Commissioner of the General Land Office to the United States Surveyor General, Salt Lake City, Utah, under date of June 17, 1909:

"A mineral surveyor who previous to his appointment had made a homestead entry, could complete his proofs and receive patent."

It is to be remembered that in no sense did Whittren undertake the making of a *new location*. All he did was to do those acts which were necessary to validate and keep alive that location which he had *already made* and the right of property in which had fully vested in him long prior to his appointment.

If the mind can be brought to make itself believe that under the circumstances of this case it was necessary that Whittren make a new discovery in order to keep alive his rights, surely his connection with the general land office, if any, would not prohibit the performance of this act upon his part any more than it would inhibit the performance by him of the *annual assessment work necessary to accomplish the same result*, and we assume that no one would con-

tend that he would be prohibited from performing the annual labor required by law by reason of his appointment as a Deputy Mineral Surveyor.

INNOCENT PURCHASERS.

But conceding for the purpose of argument that Whittren was not only disqualified from making a new location, but even from doing any act necessary or requisite to the keeping alive of the location already made, it does not even yet follow that his grantees who took in perfect good faith and for a valuable and adequate consideration without any knowledge or notice either that he had drawn in the *wrong side line* or that he was a Deputy Mineral Surveyor, should be deprived of their property by third parties who are *without superior equities*.

It is true that this court has held, in homestead and pre-emption claims, that, as against the government seeking to cancel the entry for fraud, there could be no innocent purchaser prior to patent.

But these decisions rest upon the principle that in homestead and pre-emption cases prior to patent it is only the equitable title that is passed.

In the case of mining claims a legal estate of freehold passes upon a valid location, continuing so long as the locator shall comply with the law.

The grant of the statute is:

"The locators of all mining locations heretofore made or which shall hereafter be made * * * their heirs or assigns * * * *so long as* they comply with the laws of the United States * * * shall have the exclusive right of possession and enjoyment, etc."

While there has been much confusion among the text writers and decisions as to the exact *tenure* by which a mining claim is holden upon location and prior to patent, it is believed that the question is in fact a simple one.

It is a grant as defined by Coke, upon *condition in law* as opposed to one upon condition subsequent or precedent. It is identical with the illustration given of "*a grant to A so long as he shall remain parson of Dale.*" It is a qualified fee, amounting to a freehold. The estate may terminate by failure to comply with the mining laws at any time. On the other hand, it may continue forever. This is a legal estate just as much as the grant of an estate to A so long as the government of the United States shall continue Republican in form.

That it was an estate of freehold was expressly held in *White Star v. Hultberg* (Ill. 1906), 77 North-eastern, 334.

The issuance of patent *merely enlarges this estate to the fee simple absolute.*

Such titles, that is estates upon *condition in law*, are not *equitable*; they are *legal*.

From this it follows that the conveyance of such an estate to an innocent purchaser for value and without notice will cut off the equities of third parties. How much more, then, should such conveyance cut off *subsequent locators who are utterly without equity*? The manifest injustice of a contrary rule must be apparent.

This is *not a suit by the government* and even if the

case was similar to homestead or pre-emption entries, the doctrine there announced as to innocent purchasers would not apply.

THE QUESTION CANNOT BE RAISED BY PLAINTIFFS.

So, even though Whittren were disqualified and to such an extent as to render his location invalid as against the government, this is a matter in which the government, and it alone, is interested.

This was no adverse suit. In such cases it has been determined time and time again that the *disqualification* of the locator *cannot be raised*.

This point, it is insisted, is conclusive of this case.

It was not considered by the court below in its opinion.

No distinction can be drawn by any process of reasoning *between persons who are disqualified under the law*. They are simply *disqualified*; neither is more so than the other. And if it be conceded, for the purpose of argument, that a Deputy Mineral Surveyor is disqualified, there can be no question as to an alien, for he is made so by the *very terms* of the statute, the grant being only to citizens, or those who have declared their intention to become such.

Yet it has been uniformly decided that the question of the disqualification of the locator by reason of alienage could not be raised in a proceeding, such as this.

Lindley on Mines, Vol. 1, Sec. 233.

Martin's Mining Law, Sec. 98.

Costigon on Mines, p. 167.

Snyder on Mines, Sec. 263.

Lone Jack Mining Co. v. Megginson, 82 Fed., 89.

Billings v. Asten, 51 Fed., 338; 52 Fed., 251.

Tornanses v. Melsing, 109 Fed., 711.

Shea v. Nilima, 133 Fed., 209.

Manuel v. Wulff, 152 U. S., 505.

McKinley v. Alaska, 183 U. S., 563.

In the latter case this court said:

“The meaning of *Manuel v. Wulff* is that the location by an alien and all of the rights following from such location, are voidable and not void *and are free from attack by anyone except the government.*”

If the location by a disqualified alien is free from attack by anyone except the government, it is not quite observed how the location of a Deputy Mineral Surveyor, equally disqualified, is not also free from such attack unless there be *degrees of disqualification* with which we are unfamiliar. It would seem that *disqualification* is *disqualification*, and that the rule in all cases should be the same.

For the reasons assigned it is respectfully submitted that the decision of the Circuit Court of Appeals for the Ninth Judicial Circuit affirming the judgment of the District Court of Alaska for the Second Division, should be reversed.

ALBERT FINK,

Attorney for Petitioners Whittren and Eadie.

70
No. 84

FILED.

DEC 4 1911

JAMES H. McKENNEY

CLERK

In the Supreme Court

OF THE
United States

OCTOBER TERM 1911

FRANK H. WASKEY, JOSEPH M. CRAB-
TREE, J. POTTER WHITTREN and
ANDREW EADIE,

Petitioners,

vs.

JOSEPH HAMMER, OTTO HALLA and B.
SCHWARZ,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals
for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

ALBERT H. ELLIOT,
Attorney for Respondents.

GEORGE W. REA,
Of Counsel.

Filed this day of November, 1911.

JAMES H. McKENNEY, Clerk.

By Deputy Clerk.



Index and Summary of the Argument.

The first location of the Bon Voyage dated January 2, 1902, was abandoned by Whittren, when he drew in his lines November 11, 1903, and excluded his discovery hole from the ground actually located.

The second location of the Bon Voyage consummated by Whittren December 13, 1903, when he discovered gold within the lines of the Bon Voyage, was invalid because Whittren performed the acts of location while he was a Deputy Mineral Surveyor.

A Deputy Mineral Surveyor is prohibited by Section 452 of the Revised Statutes from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands.

Whittren was appointed a Deputy Mineral Surveyor in February, 1903, and was charged with the prohibitive restrictions of his office at the very moment that he was making his location of the Bon Voyage.

Schwarz completed his location of the Golden Bull claim January 20, 1904, by recording his location notice, he having previously discovered gold within the limits of the Golden Bull in September, 1901, and having staked the claim on January 1, 1904.

CONCLUSION.

Schwarz and his successors in interest (respondents herein) are clearly entitled to possession of the eight acres in conflict between the Bon Voyage and the Golden Bull locations.

**Chronology of the Important Facts,
Set Forth in the Transcript.**

- 1902—Jan. 2, Whittren located Bon Voyage.
“ “ Halla discovered gold on Golden Bull.
“ “ 10, Halla located Golden Bull for Roth.
1903—Feb. Whittren appointed Deputy Mineral
Surveyor.
“ Nov. 11, Resurvey of Bon Voyage by Whittren
and drawing in of lines.
“ Dec. 13, Whittren discovered gold on Bon Voy-
age.
1904—Jan. 1, Schwarz staked Golden Bull.
“ “ 20, Schwarz recorded Golden Bull location
notice.
“ Mar. 23, Schwarz deeded one-half Golden Bull
to Halla.
1905—Sept. 24, Whittren deeded one-half Bon Voyage
to Eadie.
1906—June 11, Whittren and Eadie leased Western
220 feet Bon Voyage to Waskey until
June 1, 1908.
“ June 20, Whittren and Eadie leased Eastern 440
feet Bon Voyage to Waskey and
Eadie.
“ Oct. 15, Suit Hammer v. Waskey begun.
1907—Sept. 6, Trial of action.
“ Nov. 16, Judgment for Plaintiffs filed.
1909—May 3, Judgment affirmed by U. S. Circuit
Court of Appeals.
“ July 6, Petition for Certiorari filed in the Su-
preme Court.
1910—Jan. 4, Return to Petition filed.

No. 84

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for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

Statement of the Case.

The case at bar is brought before this Court on petition for writ of certiorari and the return thereto, the

said writ being directed to the Circuit Court of Appeals for the Ninth Circuit. From the transcript of record, it appears that this Court is asked to review the judgment of the said Circuit Court of Appeals, rendered in an action wherein petitioners were plaintiffs in error and respondents were defendants in error, the said judgment having been given on appeal by writ of error from the District Court of Alaska, Second Division. The original action was one in ejectment brought by respondents as plaintiffs in the said District Court of Alaska, against petitioners, as defendants to secure possession of a certain piece of mining ground described generally as the Golden Bull Placer Mining Claim, situated in the Cape Nome Mining District, Alaska. The case was tried in the lower Court by the judge of said Court, sitting with a jury, but at the conclusion of the trial, on motion of said plaintiff (respondents), the jury were instructed by the Court to find for plaintiffs. From the judgment entered in pursuance of the verdict of the jury, writ of error was sued out by defendants (petitioners) to the Circuit Court of Appeals for the Ninth Circuit. The case was again heard upon said writ of error and judgment was rendered by said Circuit Court of Appeals affirming the judgment of the said District Court. A review of said judgment of affirmance is now sought upon the grounds (1) that the said judgment of the said Circuit Court of Appeals proceeds upon a proposition of law never before determined by this Court. (2) That the said judgment is in conflict with the doctrine laid down

by this Court in certain adjudicated cases. (3) That a question is decided, upon which there is a conflict between two decisions of the highest Courts, of two States, and (4) That the said Circuit Court of Appeals exceeded its jurisdiction in enforcing the doctrine of "office found" in a possessory action between two litigants to which the United States was not a party, and in adding an additional penalty beyond the one expressed in the Statute itself.

The return of the writ of certiorari was filed in this Court January 4, 1910, and contains a full transcript of all the proceedings had in the case subsequent to the judgment rendered by the District Court therein, and also a bill of exceptions setting forth the evidence and pleadings upon which judgment in the first instance was rendered. The entire case is now before this Court, including the original judgment, and the lower Court's opinion thereon, the affirmance of said judgment with the opinion of the said Circuit Court of Appeals in support thereof. Petitioners are praying that the said judgment of the said Circuit Court of Appeals be set aside while respondents are asking that the said judgment be affirmed.

The Facts.

At the conclusion of the trial of the action in the District Court, plaintiffs moved the Court to instruct the jury to find for plaintiffs (respondents) upon specific grounds as follows:—

“First. That the testimony as now adduced before
 “the Court and to the jury shows that on the 1st day
 “of January, the land included within the Golden Bull
 “location was open and unappropriated public domain
 “of the United States and subject to location;

“Second. Because the defendants have not estab-
 “lished any defense to the plaintiff’s complaint or have
 “not answered in any way the testimony submitted
 “by the plaintiff in the case.

“(Jury withdrawn by order of the Court.)

“Mr. REED (continuing). The testimony submitted
 “by the defendants shows that the discovery made
 “by Mr. J. Potter Whittren in the year 1901 as marked
 “upon the map by the witness himself, was at the point
 “No. 22; that on November 11th, 1903, the time when
 “he made the survey of the claim and drew in the
 “lines of the Bon Voyage claim it left the point where
 “a discovery was made outside and not within the
 “lines of the said Bon Voyage claim, and the defend-
 “ants themselves recognizing that it was necessary
 “that a discovery of gold be made within the lines of
 “the location as amended, put Mr. Whittren back on
 “the witness-stand, just before they closed their case
 “on Saturday evening, and he testified that on De-
 “cember 11th, 1903, he again went to the mining
 “claim in question and made a discovery at the point
 “designated as the prospect shaft and within the lines
 “of the said Bon Voyage claim.

“The testimony also shows that at the time of said
 “discovery of gold Mr. J. Potter Whittren was a

“ Deputy Mineral Surveyor of the United States, and
“ therefore under the laws of the United States inca-
“ pacitated to make a mining location.”

(Transcript p. 45.)

The Court granted the motion of plaintiffs and so instructed the jury. The effect of the granting of the motion of plaintiffs was to remove from the jury the necessity of deciding any controverted question of fact. So far as the issue now before this Court is concerned, we may assume that there is no disputed question of fact involved and the questions of law to be discussed arise from facts about which, we think, there can be no serious controversy. The facts are in substance as follows:—

On January 2, 1902, petitioner Whittren located the Bon Voyage claim. In February, 1903, he was appointed a Deputy Mineral Surveyor. On November 11, 1903, while he was such Surveyor, he went upon the Bon Voyage claim and surveyed it. Finding that the claim in accordance with the stakes as set by him in 1902, included more than the 20 acres permitted by law, he pulled in his northwest and southwest stakes so that the claim would be 1320 feet long by 660 feet wide. In drawing in the stakes, however, he left out of the claim altogether the discovery hole where he had discovered gold in 1902. Thereafter, on December 13, 1903, he discovered gold within the boundaries of the Bon Voyage as said boundaries were fixed by him on November 11th of the same year.

On January 1, 1904, respondent Schwarz located the Golden Bull claim, a portion, about eight acres, of which overlapped the Bon Voyage. This location was complete in every way, including the markings on the ground, the discovery of gold and the recording of the location notice. On March 23, 1904, Schwarz deeded a half interest in the claim to respondent Halla, and he also conveyed a quarter interest to respondent Hammer.

Whittren on September 24, 1905, deeded a half interest in the Bon Voyage to petitioner Eadie. On June 11, 1906, Whittren and Eadie leased the western 220 feet of the claim to petitioner Waskey and later Whittren and Eadie leased the eastern 440 feet of the claim to Waskey and Eadie. The lessees of the Bon Voyage developed a pay streak which was in the portion of the ground overlapped by the two locations of the Bon Voyage and the Golden Bull, so the question as to which location is valid and superior will be determinative of the rights which the various parties have either as owners or lessees in the pay streak. As the facts are practically admitted by all the parties to the controversy, no extended statement of the evidence would seem to be necessary and we shall now proceed to the discussion of the questions of law which have arisen in the case.

The Law.

I.

WHITTREN WAS A DEPUTY MINERAL SURVEYOR OF THE UNITED STATES AT THE TIME OF THE LOCATION OF THE BON VOYAGE AND AS SUCH WAS SUBJECT TO THE SPECIFIC PROHIBITION OF SECTION 452 OF THE REVISED STATUTES.

There is no dispute about the fact that during February, 1903, Whittren was appointed and duly qualified as a Deputy Mineral Surveyor. The first questions we should ask are (a) Who is a Deputy Mineral Surveyor? (b) How is he appointed? (c) What are his duties?

(a)

Answering our first question, we find that a Deputy Mineral Surveyor is a surveyor appointed by the Surveyor General of the United States. He is appointed to survey mining claims and before entering upon the duties of his office, he must give a bond for the faithful performance of the duties of his office in accordance with the regulations of the Land Department in force at the time of his appointment (Regulations of Land Department, General Mining Circular of December 18, 1903).

(b)

As many competent surveyors as shall apply for appointment shall be appointed under Section 2324, U. S. Revised Statutes, and especially shall one or more be appointed in each mining district for the conven-

ience of miners (*supra* Sections 92 and 115). Persons desiring the appointment should file applications with the Surveyor-General, who will furnish all necessary information (*supra* Section 116). And all appointments must be submitted to the Commissioner of the General Land Office for approval. The appointments may be revoked or suspended for cause and before final action is taken the matter must be submitted to the General Land Office for approval.

(c)

Mineral surveyors must correct errors due to their carelessness or suffer "suspension or revocation of his commission". They must keep accurate record of their surveys. They must make a verified return of surveys to the Surveyor General.

From reading the regulations of the Land Department applicable to Deputy Mineral Surveyors, we are impressed with the fact that they seem to be very important persons in the system by which the Government of the United States administers its public lands through the agency of the Land Department. The Surveyor General and his office are an integral part of the Land Office. Instead of deputies being sent out from the Surveyor General's office to make surveys of public lands for the greater convenience of miners and in order to save expenses, the Statute provides for the appointment by the Surveyor General of local deputies who are qualified to act as agents of

the government in the matter of the surveys of public lands. The deputies do not work in the Surveyor General's office at Washington, but they are in the field, prepared to make the surveys requested by the miners. They file their reports and surveys with the Surveyor General and their surveys, when properly verified, are accepted by the Land Department as official acts.

Section 452 of the Revised Statutes reads as follows:

"The officers, clerks and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public lands, and any person who violates this section shall forthwith be removed from his office."

If we search for a reason for the existence of such a Statute as this, the principle involved is applicable to a Deputy Mineral Surveyor, just as much as to a clerk in the General Land Office at Washington. In fact, we think there is more reason for prohibiting a Deputy Mineral Surveyor from acquiring public lands than a mere clerk who has access to records in the office. The surveyor acquires his information at first hand and could use it for his own profit before others knew the facts. Instead of assisting the Department in administering the public lands, selfish motives would be impelling him to acquisition of lands where there was a conflict of surveys, or excess of a claim over the amount allowed by law. The sound public policy of the statute cannot be questioned and the applica-

bility of the Statute to deputy mineral surveyors, based on the same public policy, seems to us obvious. However, we are not without precedents so far as the question is concerned.

The Land Department has construed the section as applicable to Deputy Mineral Surveyors in the following cases:

In re Herbert McMicken, 10 L. D. 97:

THE FACTS OF THE CASE.—

McMicken made timber land entry upon public land in the Territory of Washington and was a clerk in the office of the Surveyor General at the time of the act of entry.

THE LAW OF THE CASE.—

Quoting from page 99 of the opinion:

“ * * * that Section 452 of the Revised Statutes was intended to extend the disqualification to acquire public lands to the officers, clerks and employees in any of the branches or arms of the public service under the control and supervision of the commissioner in the discharge of his duties relating to the survey and sale of the public lands * * * officers, clerks and employees in the office of the Surveyor General fall clearly within the mischief contemplated by the Statute, and the reason of the law applies to them with equally as much force as to those in the Central Office at Washington. * * * It is ingeniously argued * * * that the prohibition to be found in Section 14 of said Act of 1836 only applied to officers whose salaries were ‘therein provided for’; that clerks of the Surveyor General’s office not being ‘provided for’ were not in-

tended to be included and that Section 452 of the Revised Statutes being a mere generalization of Section 14 of the original act ought not to be construed as an enlargement of the same so as to include classes not embraced in the original prohibition.

* * * "For the reasons here given, in addition to those before stated, I have no difficulty in affirming the former ruling that clerks in the office of the Surveyor General are clerks or employees in the office of the Commissioner of the General Land Office, in contemplation of the law, and therefore within the inhibition of Section 452 of the Revised Statutes."

We cite also the case of

Muller v. Coleman, 18 L. D. 394,

which expressly applies the Statute in question to a Deputy Surveyor and denies him the right of entry.

The case of *In re Neill*, 24 L. D. 393, follows, holding that the same doctrine is applicable to a Surveyor General.

In the case of *Floyd v. Montgomery*, 26 L. D. 122, a Deputy Surveyor was an applicant for a patent. He had not taken up the claim while Deputy Surveyor, but after his survey and before application for patent he became interested in it and was one of the seven applicants for patent. The Department ruled that he was disqualified by the Statute from acquiring title and struck his name out as one of the applicants.

In the cases of *Frank Maxwell*, 29 L. D. 76, and *Alfred Baltzell*, 29 L. D. 333, the same principle was

followed and deputy surveyors were held barred from making entry.

This brings us to the two cases of *Lavagnino v. Uhlig*, 71 Pac. 1046, and *Hand v. Cook*, 92 Pac. 3, the former of which cases was decided by the Supreme Court of Utah and the latter by the Supreme Court of Nevada.

It was earnestly contended by petitioners in their petition for writ of certiorari herein that there was a conflict of authority regarding the point under discussion between the Supreme Court of Utah and the Supreme Court of Nevada, and that the case at bar therefore presented one of the cases wherein this Court issues writ of certiorari, that is "the necessity of avoiding conflict between two or more Courts of Appeal or between Courts of Appeal and the Courts of a State".

Forsythe v. Hammer, 166 U. S. 514.

It therefore becomes necessary to analyze these two cases somewhat rigidly.

Lavagnino v. Uhlig et al., Supreme Court of Utah, decided Sept. 4, 1903, 71 Pac. Reporter 1046, 99 Am. Stat. Rep. 808.

THE FACTS OF THE CASE.—

One J. Fewsom Smith Jr., while a Deputy United States Mineral Surveyor, located a claim called the "Yes You Do" and afterwards transferred the claim to Lavagnino, who was the plaintiff in the case.

At the trial the plaintiff offered in evidence a certified copy of location notice of the "Yes You Do" and the defendants objected thereto on the ground that "it appears that the said mining claim was not located by a person, who had the power under the Act of Congress to locate mineral ground, it appearing from the testimony of the witness that he was at the time mentioned * * * a Deputy United States Mineral Surveyor for Utah and therefore incompetent to make locations. * * * The trial Court excluded said notice on the ground that J. Fewson Smith Jr., locator of claim, was prohibited from making the location of a lode mining claim and therefore had not the qualifications to initiate any title by any act that he did with reference to locating the 'Yes You Do' mining claim."

THE LAW.—

In sustaining the order of the Court refusing to admit in evidence the location notice, the Supreme Court of Utah first cites Section 452 and Section 2319 of the Revised Statutes in full, and then says:

"* * * it was the intention of Congress to prohibit on the ground of public policy, officers, clerks and employees in the General Land Office from acquiring directly or indirectly an interest in the purchase from the Government of any of the public land of the United States. * * *

"We think that the section in question includes mineral surveyors and prohibits them, as held by the Land Department from entering any of the public lands while they are such deputies, and

also from directly or indirectly acquiring any interest in the purchase from the Government of the same.

"It follows that J. Fewson Smith Jr., while he was a Deputy Mineral Surveyor, was prohibited by said section from entering a mining claim or from directly or indirectly acquiring any right or interest in the purchase from the Government of such a claim.

"He was also prohibited at that time from doing any of the acts upon the performance of which, under the provisions of the Mining Law of 1872, the right of making an entry or purchase from the Government depends and that his location of the 'Yes You Do' was therefore void and Lavaguino acquired no rights under the deed from him to the same."

Hand et al. v. Cook et al., Supreme Court of Nevada, decided Oct. 17, 1907, 92 Pac. Rep. 3.

On January 1, 1904, defendant Cook, who was a Deputy U. S. Mineral Surveyor located a claim and called it the "Yuba East" claim.

It was conceded that Cook had made a valid location and that the claim was his property unless he was disqualified from making a valid location, because of the fact that he was Deputy U. S. Mineral Surveyor.

After a review of the various acts bearing on the subject of disqualification of officers and employees of the land department to purchase public lands of the United States Government and after a review of the various decisions of the United States Land Office bearing on the matter, the learned Judge Norcross, who wrote the opinion, says:—

"A careful examination of the points presented in this case convinces us that the rulings of the Land Department, in so far as they hold or infer that a deputy mineral surveyor is disqualified to locate a mining claim because of the provisions of Revised Statutes, Section 452, are erroneous. * * * for the position we think is well taken that a deputy mineral surveyor is not an officer, clerk or employee in the General Land Office * * *"

This opinion was concurred in by Judge Sweeny of the same Court, but Judge Talbot wrote a strong dissenting opinion in which he says, at page 11:

"In the conclusion reached by my associates that Cook was not disqualified as a United States Deputy Mineral Surveyor from making locations, I am unable to agree.

"The language in Section 452 * * * plainly contains a prohibition against officers, clerks and employees in the Land Office purchasing or becoming interested, directly or indirectly, in the purchase of the public lands, and, in addition, a penalty by removal from office is added. * * * The language of the act being plain, it ought not to be varied by reference to any former acts which it supersedes and repeals.

"As the location of mining claims is the first step toward the acquiring and purchasing of them from the Government, and the officers, clerks and employees in the land office are prohibited from purchasing or becoming interested in the purchase of the public lands, it follows that they ought to be considered as prohibited from making locations. Full force and fair interpretation should be given to the words used.

"The holding of the majority of the Court that the penalty clause of the Statute only is effective, and that the word 'prohibit' which it contains

does not prohibit is equivalent to the elimination and judicial repeal of the prohibition enacted by Congress.

* * * "If there be any doubt as to whether his designation in the Statute as a deputy, and the other provisions do not bring him within the letter of the law, he comes within its spirit and if the letter kills the spirit ought to control and give life to the Statute.

"When we look to the object and purpose of the restriction by Congress against the acquiring of public lands by the officers, clerks and employees in the Land Office, stronger reasons are apparent for prohibiting the deputy surveyors from locating mining claims than for placing such restraint on other officers. * * * In my opinion the past rulings and present practice as made by the Secretary of the Interior, and the Commissioner of the General Land Office and the opinion of the Supreme Court of Utah in the Uhlig case and the decision of the District Court that Deputy Mineral Surveyors are barred by the Act of Congress from making mining locations, ought to be approved and followed and the judgment, from which the appeal is taken, ought to be affirmed."

We have cited at length from the dissenting opinion in the above case in order to show first, that the Court was divided, and second, that the dissenting opinion is supported by sound reason.

In commenting on the above case, Costigan in his work on Mining Law at page 170, says,

"While the Court seems to have been in error in saying that Deputy United States Mineral Surveyors are not covered by the above mentioned Statute (Sec. 452 Rev. Statutes), nobody but the Government could possibly object to a location

by a Deputy Mineral Surveyor and the Court was therefore right in its decision, but erred in the reason given for it.

"The dissenting judge in the case being discussed, seems right in adhering 'to the broader construction that clerks, officers and employees in the General Land Office include officers, clerks and employees in the offices of the Surveyors General or the local land offices, which are merely arms or branches of the General Land Office', but he also erred in regarding the location as absolutely void."

The same author, in speaking of *Lavagnino v. Uhlig*, supra, says:

"This is but a State decision, for the United States Supreme Court, when the case came before it, avoided the point by basing its decision on the ground that the land was not open to location."

Costigan on Mining Law, page 170;

Lavagnino v. Uhlig, 198 U. S. 443.

We submit that so far as these two cases are concerned, there is a substantial agreement on the question that a Deputy U. S. Mineral Surveyor comes within the restrictive prohibition of Section 452 of the Revised Statutes.

II.

A DEPUTY MINERAL SURVEYOR UNDER SECTION 452 REVISED STATUTES IS PROHIBITED FROM ACQUIRING BY PURCHASE DIRECTLY OR INDIRECTLY THE PUBLIC LANDS OF THE UNITED STATES, AND HENCE HE CANNOT PERFORM VALID ACTS OF LOCATION OF A MINING CLAIM.

The facts in the case at bar upon which the above proposition of law is predicated are not disputed but

there may be a difference of opinion as to just what construction should be placed on the facts. When Whittren surveyed his claim on November 11, 1903, he voluntarily and intentionally excluded the part of the ground upon which he had discovered gold. It was no mere accident on his part, but he knew where his discovery hole was, and being a surveyor he was well qualified to know that the replacement of the northwest and southwest stakes threw his north and west lines inside the discovery point. He had the choice of cutting off the excess of his claim over twenty acres from any part of the claim which he might wish. He made the choice and deliberately decided to exclude the ground which was known by discovery to contain gold.

The law which makes the discovery of gold one of the requisites necessary for the acquiring of a possessory title to public lands for mining purposes is a good one. It was never intended that possession of public lands might be retained under an alleged mining location where the land was not in fact mineral land. The discovery of gold is an important step, if indeed it is not the most important step in the entire proceeding. It is true that there need not be a discovery of gold upon every square foot of the claim. It is also true that a discovery off the claim will not avail the locator. Twenty acres has been determined by the Government as the size of a claim. Whether or not the land to be located is mineral land, is the first question. A discovery of gold seems to settle the matter.

If Whittren could make his discovery twenty feet outside the lines of his claim as determined by himself, serve as a discovery on the claim itself, then this doctrine of vicarious gold discovery would render the plain terms of the statute of no effect. It is obvious that Whittren did not consider the discovery of 1902 sufficient for completing the location of the Bon Voyage with its corrected lines, because he proceeded to make a new discovery within the proper lines of the claim, December 13, 1903.

It has been argued that the excess of a claim over the twenty acres cannot be taken from a locator until he has been given an opportunity to correct his lines to conform to the law. We concede that a location made in good faith and otherwise conformable to law is not rendered wholly void because of an excess, but only the excess portion is void and the locator is at liberty to select the portion which he wishes to reject.

Zimmerman v. Funchion et al., 161 Fed. 859;

Price v. McIntosh, 121 Fed. 716.

It has also been argued that a locator may make his discovery of gold after he has staked the claim; that the order in which the events take place is not material provided no bona fide intervening rights accrue.

We concede these propositions of law and applying them to the facts in the case at bar, the discovery of gold by Whittren in December, 1903, would have completed the location of the Bon Voyage begun the same year before the Schwarz location of the Golden Bull,

if Whittren had had the capacity to make a location of public land at that time.

(a)

Marking of Boundaries on the Ground and Discovery of Gold are Two Acts Necessary to a Valid Mining Location.

In some places also recording of location notice is a third step which must be taken. As already stated, the order in which these acts is performed is immaterial, provided that no such lapse of time occurs between the acts as brings in intervening rights. Both of the acts of marking boundaries and discovering gold are essential. The location rests upon the discovery as well as upon the marking of the boundaries. If a miner marks his boundaries and then fails to make a discovery *within the limits of the boundaries* he has no title to the ground. If he makes a discovery of gold and fails to mark boundaries on the surface of the ground including the discovery, he fails to get title to the ground. The two things must converge, as it were, on the same ground, though not necessarily at the same time. A discovery of gold at a prior time might be availed of by a locator if no intervening rights interfere, but a discovery of gold at a different place, obviously outside the boundaries of the claim actually decided upon by the locator himself, cannot be used in locating the claim. This Court has said in *Gwillim v. Donnellan*, 115 U. S. 45, 50: The discovery

“must lie within the limits of the location which is made by reason of it. If the title to the discovery fails, so must the location which rests upon it”.

(b)

Locating a Mining Claim is "Purchasing or Becoming Interested in the Purchase of any of the Public Lands" Within the Meaning of the Statute.

The word "purchase" has acquired a technical meaning in law—that is, "to purchase" is any method of acquiring real property other than by descent.

"The acquisition of real estate by any means whatever, except descent."

Farrington v. Wilson, 29 Wis. 383, 392.

" * * * In its technical and larger sense in case of land, the act of obtaining or acquiring title to lands and tenements by money, deed, gift or any other means except by descent."

32 Cyc., p. 1265.

We do not see how the word purchase, as used in the Statute, can have any other than the broadest kind of a meaning. It so happens also that the technical meaning of the word gives it a much larger scope than the so-called common use as signifying acquisition by payment of money. We are fortunate indeed in having the technical use of the word subserve public policy as too often that which is technical is against public policy, while here the whole policy of the Statute indicates that the intention is to prohibit officers and employees of the Land Department from acquiring public lands in any way with the exception of the involuntary method of descent.

(c)

When Whittren Drew in His Lines and Excluded His Discovery Point He Abandoned His Location of January, 1902, and the Ground was Open to Location by Schwarz if the Attempted Relocation of 1903 by Whittren was Invalid.

As we have already stated, Whittren was a surveyor; knew where his discovery of 1902 had been made; and deliberately and intentionally excluded it from the Bon Voyage. If any other fact is needed to show a clear intention on the part of Whittren to abandon his location of 1902, it is found in the circumstance that after his survey and resetting of the northwest and southwest stakes, he considered it necessary to make a new discovery of gold *within* his boundaries.

What constitutes abandonment of a location? In the decision of the Circuit Court of Appeals in the case at bar, Judge Ross says:—

“When, therefore, Whittren in November, 1903, left
“out of his boundaries the only place upon which he
“had then made a discovery of mineral, he abandoned
“one of the essential elements of his location. It is
“true that the evidence tended to show that he still
“maintained his claim to the ground included within
“his readjusted boundaries, which were marked as
“required by the Statute and embraced only the statutory area, but within those boundaries he had not
“then made a discovery of mineral.”

Trans. p. 64.

In the case of *Farrell v. Lockhart*, 210 U. S. 142, it appears that there were three locations covering the ground.

The first location under the name of South Mountain lapsed because of no assessment work thereon December 21, 1901. The second location called the Cliff was initiated August 1, 1901, which was before the time had expired for doing assessment work under the first location. The third location called the Divide was initiated January 2, 1903. The decision of the Supreme Court of Utah was in favor of the third location and against the second location (the first location was not represented in the litigation) on the ground that the land was not open and subject to location by the second locator because the time for doing the assessment work under the first location had not lapsed. In reversing the decision of the Supreme Court of Utah, this Court, speaking through Justice White, says:—

“It does not therefore include the conception that the mere fact that a senior location had been made, and that the statutory period for performing the annual labor had not expired when the second location was made, would conclusively establish that the location was a valid and subsisting location, preventing the initiation of rights in the ground by another claimant, if at the time of such second location there had been an actual abandonment of the original senior location. We say this because—taking into view *Belk v. Meagher*, *Lavagnino v. Uhlig* and *Brown v. Gurney*—we are of the opinion and so hold, that ground embraced in a mining location may become a part of the public domain so as to be subject to another location before the expiration of the statutory period for performing annual labor if at the time when the second location was made, there had been an actual abandonment of the claim by the first locator.

"In *Black v. Elkhorn Mining Company*, 163 U. S. 445, summing up as to the character of the right, which is granted by the United States to a mining locator, after observing that no written instrument is necessary to create the right, and that it may be forfeited by the failure of the locator to do the necessary amount of work, it was said (p. 450)

"(3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

"'An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. *Snell v. Levitt*, 110 N. Y. 595, and cases cited at p. 603 of the opinion of Earl, J.; *White v. Manhattan Railway Co.*, 139 N. Y. 19. If the locator remained in possession and failed to do the work provided for by Statute, his interest would terminate, and it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the Statute would terminate under such circumstances'."

The case of *Lavagnino v. Uhlig*, 198 U. S. 443, also presents a situation where the first locator was held to have abandoned his location in favor of a junior locator.

Thus reasoning by analogy if we consider Whittren in 1903 as a different locator from Whittren in 1902, then the Whittren of 1903 attempted to locate an abandoned or forfeited claim, and might have done so if

he had not been suffering under the disqualification. But that the Whittren of 1903 did intend to abandon his location of 1902 and that he did carry out that intention by the act of throwing out his discovery point, is clear from the evidence.

Syllabus:

"A location based upon a discovery within the limits of another existing and valid location is void."

Tuolumne Consolidated Mg. Co. v. A. C. Maier,
134 Cal. 583.

(d)

**A Person Specifically Prohibited by a Statute from Acquiring
Public Lands Cannot Initiate Title Thereto.**

It has been argued with force and ingenuity (1) that despite the words of the Statute, the title to public lands initiated by a Land Office employee is valid until and unless assailed by the Government in a direct proceeding where "office found" is an issue; (2) that the disqualification of employment in the General Land Office is like the disqualification of alienage and that reasoning from analogy, the title initiated by the employee in the Land Office is not void, but voidable only at the instance of the Government; (3) that the title to public lands acquired by an employee in the Land Office may be valid in the hands of innocent purchasers, despite the fact that the title might be invalidated in the hands of said employee at the suit of the Government; (4) that the title of an employee in the Land Office to public lands may be transmitted to others be-

cause the reasoning of the National Bank Indian reservation and alienage cases sustains the conclusion that such title is voidable and not void; and finally (5) that the Statute under consideration prescribes a penalty, to-wit, dismissal from office, and that invalidation of the title to public lands acquired by an employee in the Land Office would be adding an additional penalty to the Statute which the Court cannot do.

We are anticipating the arguments of petitioners, in the hope that it will not be necessary for respondents to file another brief in reply after petitioners' brief shall have been filed. The case has been already elaborately briefed by the very able counsel for petitioners and we shall take the liberty of replying to the arguments presented.

As was said by the learned judge who wrote the opinion in the United States Circuit Court of Appeals, "Nor do we see that there is any much clearer way to prohibit an act than to say expressly that it is prohibited. That Congress did in the section in question" (Trans. p. 65).

The very act of locating the public lands is prohibited. All the specific steps which together make up the location of the claim are prohibited. Everything done in order to acquire the right of possession of the ground for the purpose of taking out the minerals therein, is prohibited because all these things linked together make up the chain of purchase. There never was a purchase from the Government by Whittren because he could not do the things, directly or indirectly,

necessary to be done to initiate the proceedings ending in a purchase. The disqualification of Whittren was primal, inherent and perpetual—such is the obvious public policy which is breathed from every line and word of the Statute. The public lands were to be held sacred and inviolable, from the touch of Government employees. The burden and embarrassment of public office should not be removed by judicial interpretation. The powerful voice of the law should encourage those whose care of the public lands is a sacred duty.

1.

Did Whittren Acquire Such a Title that He Could Hold the Claim Against the Whole World Except the Government of the United States?

The case of *Prosser v. Finn*, 208 U. S. 67, seems to answer this question.

THE FACTS OF THE CASE.—

On the 18th day of October, 1882, Prosser made a timber culture entry at the proper land office in Washington for the lands in dispute and thereafter duly planted trees, and by cultivation in good faith, improved the lands at great labor and expense.

His entry was completed in all respects pursuant to the Statute. On October 28, 1889, one Walker filed against Prosser's entry an affidavit of contest, setting forth amongst other things that Prosser at the time of entry was an acting United States timber inspector and that as such inspector he was prohibited by law from making his entry.

The local land office sustained Walker's contest, holding that bad faith could not be imputed to the entryman and stating that a great hardship had been done the contestee in the case, but holding that the Statute made it illegal for Prosser to make his entry, because at the time he was a special agent of the Land Office.

Walker was permitted to enter the lands, he having at the time full knowledge. Subsequently a patent was issued to Finn, present defendant in error.

THE LAW OF THE CASE.—

The Supreme Court of the United States, through Mr. Justice Harlan, in commenting upon these facts, says:

“This case depends upon the construction to be given to Sec. 452, Revised Statutes. * * * The difficulty in the way of any relief being granted to plaintiff arises from the Statute prohibiting any officer, Clerk or employee in the General Land Office directly or indirectly from purchasing or becoming interested in the purchase of any of the public lands. That a special agent of the General Land Office is an employee in that office is, we think, too clear to admit of serious doubt. Referring to the Timber Culture Statute, Secretary Smith well said:

“‘When the object of the Act is considered, it will be seen that it applies with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge, the use of which it was the intention of the Act to prevent * * *.’”

* * * "They are in every substantial sense employees in the General Land Office. They are none the less so, even if it be true as suggested by the learned counsel for plaintiff that they have nothing to do with the survey and sale of the public lands or with the investigation of applications for patents or with hearings before registers and receivers. Being employees in the General Land Office it is not for the Court, in defiance of the explicit words of the Statute to exempt them from its prohibition."

We call particular attention to the fact that this case arose as an action between Prosser and Finn and that the U. S. Government was not a party to the litigation, although the Commissioner of the General Land Office had previously decided against Prosser.

There is no indication that the decision of the U. S. Government was pleaded as *res adjudicata* on the question of the validity of the Prosser entry, and in fact the entire question was examined anew and the decision of the Land Office upheld upon that point.

The only possible ground upon which the decision could be based, in view of the very great equities existing in favor of Prosser, was that his original entry was vitiated by reason of the fact that he was disqualified at the time from making any entry.

In concluding this branch of the discussion we quote from the note in *Vol. 139, American State Reports*, at page 155:

"It is because of the facts stated in the above cited case that there is at times an apparent conflict in the decisions of the Courts in cases involving the question of discovery. An examination of

the cases on this subject will show a growing tendency of the Courts to attach considerable importance to the decisions of the Interior Department upon matters affecting the disposition of the public lands. And with the growing responsibility of that department in rendering decisions which are looked to as carrying authority, there is more of a disposition by it to have a harmonious system of decisions which establish principles which are in accord with the spirit of the mineral laws and the practical needs of the mineral bearing States."

(2.)

The Alienage Cases Are Not in Point.

The Alienage Cases were decided under a statute which reads as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Costigan on Mining Law, p. 167.

It will be observed that citizens may locate mineral lands and also those who have filed declaration of intention to become citizens. Also it has been held that if an alien after an attempted location takes out his

first naturalization papers, his location becomes valid *ab initio*.

Costigan on Mining Law, p. 168;

Lone Jack Mining Co., v. Megginsen, 82 Fed. 89.

By the terms of the Statute itself the lack of qualification of an alien locator of mining ground may be removed by filing first papers. By judicial interpretation of the Statute we find the lack of qualification of an alien is such that the act of locating a claim is not vitiated, but the absence of qualification may be subsequently supplied.

Under the Statute in the case at bar it is not a question of lack of qualification but of a positive disqualification. The alien is wanting in a qualification which may later be supplied. The employee in the Land Office has a positive disqualification which incapacitates him from performing the act of locating public lands. It is a sound public policy which encourages aliens in becoming citizens. In interpreting the Statute aliens are encouraged to become citizens so that they may acquire the public lands of the United States.

In some of the earlier decisions it was held that a location by an alien was absolutely void and that the land located by an alien was open to location immediately after the attempted location (*Bohanon v. Howe*, 2 Idaho 417; *Martins Mining Law and Land Office Procedure*, Section 97), but this rule has been entirely relaxed by later decisions. We can understand how a sound public policy would suggest a liberal interpreta-

tion of the Statute in favor of aliens, while the same public policy would demand a rigid interpretation of Section 452 against an employee in the Land Office.

(3.)

The Suggestion of Protection to an Alleged Innocent Purchaser from an Employee of the Land Office Would Render the Statute Impotent to Protect Bona Fide Locators of Public Lands Against the Machinations of Officers and Employees of the Land Office.

After Whittren had purchased the claim at bar by completing his alleged location, he deeded to petitioner Eadie a half interest September 24, 1905. The record does not seem to show whether or not Eadie knew that Whittren was a Deputy Mineral Surveyor at the time the alleged location of the claim was consummated. Passing by the question as to whether the burden is not cast upon the shoulders of petitioners of showing from the record that Eadie was an innocent purchaser, we do not see how the question of "innocent purchaser" can arise.

Whittren cannot transmit to a purchaser a title possessory, or otherwise, which he never had. Whittren never had a title subject to a defeasance. He never had an inchoate title (such as an alien locator has). He was never even potentially the owner of the claim. He never had any kind of title, void, voidable, or otherwise.

There is no evidence that Whittren acted in bad faith, but for the purpose of illustrating the argument,

suppose that he had fenced in some public land without regard to any statute whatever. Does his deed transmit any title? Does the alleged purchaser of the fenced in property acquire such a title that the Government must intervene and have the "title" declared void? Whittren's disqualification was such that his hand was stayed and in law he did nothing. He located no land. His deed to Eadie was an eviscerated paper devoid of substance. His deed passed nothing because he had nothing.

A thief steals property and sells it to an innocent purchaser. Is the sale void or voidable? Must the owner have the sale declared void in order to recover his property? We answer that the sale is neither void nor voidable. There is no sale at all. There is the form of a sale without the substance. No title whatever passes to the alleged purchaser. The act of stealing gives the thief no title. He takes possession of the property just as any vendee would but from the beginning he is disqualified and the bare possession does not give even color of title.

Whittren took possession of the claim and did other acts just like the acts of a qualified locator. He could not locate public lands, however, under any circumstances while he continued as an employee of the Land Office. Therefore, he could not become the channel for the transmission of title from the Government to anyone, innocent purchaser, or otherwise.

(4.)

The National Bank Cases, Indian Reservation Cases, Foreign Corporation Cases and Ultra Vires Cases, Proceed upon a Different Principle.

(a) *The National Bank cases:*

The Statute governing National Banks reads in part as follows:

“A National Banking Association may purchase, hold, and convey real estate for the following purposes, and for no others * * *.”

Under this Statute it was held in the case of *Fritts v. Palmer*, 132 U. S. 282, that if a National Bank took a mortgage contrary to the terms of the Statute, the mortgage was not void, but voidable only in a direct suit brought for that purpose. It will be observed that this is not a case where the National Bank is laboring under a total disqualification in respect of mortgages under certain regulations. The National Bank has the *capacity* to take mortgages conformable to certain conditions. The Statute does not *prohibit* the National Bank from taking any mortgages at all. We think that a broad distinction can be drawn between a total lack of qualification to perform an act and a restriction on performing the act in any other than the prescribed way. While Whittren was a Deputy Mineral Surveyor, he could not acquire by purchase any of the public lands of the United States in any way. The National Bank could hold mortgages subject to certain specified restrictions. Whether or

not the restrictions are operative in any particular case, was and is a matter for investigation.

(b) *Indian Reservation cases:*

Under an Act of Congress throwing an Indian Reservation open to location, a time was specified on and after which the lands should be considered open. This restriction as to time was also covered by the President's proclamation as follows:

"Warning is hereby again expressly given that no person entering upon and occupying said lands before said hour * * * of April 22, 1889 * * * will ever be permitted to enter any of said lands or acquire any rights thereto * * *."

We take the above instance as being somewhat typical. In the case of *McMichael v. Murphy*, 197 U. S. 304, it was held that an entry made by a person otherwise qualified, but contrary to the statute and proclamation was *prima facie* valid.

We think the distinction between the above line of cases and the one at bar is an obvious one. In the above case the entryman was qualified but did not make his entry strictly according to the Statute and the proclamation. The entry was irregular and could possibly have been cancelled on proof of the irregularity, but it was valid until the irregularity was shown. There was an entry in fact. In the case at bar there was no location in fact because Whittren could not make a location. It was not a case of a location defectively made, the defect not appearing, but it was a case of no location at all because Whittren's hand was

stayed. All that he did was idle. There never was a location made by him of any kind or character while he was an employee of the Land Office.

(c) *Foreign Corporation cases:*

Several states have laws forbidding foreign corporations from doing business unless and until they have complied with the laws of the states as to registration, payment of fees, etc. It has been held in several cases that where a foreign corporation operating within a state having such a law and contrary thereto, takes property by deed or mortgage, such deed or mortgage is not void and collateral attack cannot be made thereon by a private person. Here again we must observe that the foreign corporation has the capacity to purchase and hold real estate. In Colorado the Statute provided that no foreign corporation should purchase or hold real estate in the State *except as provided by the Colorado law*. Whether or not there had been a compliance with the Colorado law, was the subject for investigation. There is no attempted total disqualification of a foreign corporation in the matter of holding real estate. The language used by the Supreme Court of the United States in the Colorado case of *Fritts v. Palmer*, 132 U. S. 282, is significant.

“The question whether a corporation *having capacity to purchase and hold real estate for certain defined purposes* or in certain quantities has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State within whose limits the property is situated. It cannot be

raised collaterally by private persons unless there is something in the statute expressly or by necessary implication authorizing them to do so."

(Italics ours.)

Whittren did not *have the capacity* to locate a claim while he was a Deputy Mineral Surveyor. It is not a case of power defectively or irregularly exercised, but rather a question of total lack of power.

We suggest the analogy of the well known case of a Court's total lack of jurisdiction. The judgment of such a Court is no judgment at all—it is a mere nullity and can be ignored by the whole world. When however jurisdiction exists in a Court but there is a defective or irregular exercise of it, the judgment has verity unless assailed by *interested parties* in a direct attack by appeal. In the one case the Court is without power to make any judgment whatever. There is a total incapacity. Every act done, including the judgment, is a mere form without substance. In the other case, the power and capacity are present. The acts, done, including the judgment, stand until the irregularity is established.

(d) *Ultra Vires Acts of Corporations:*

The reasoning which we have used under the previous head (c) of this brief, is a complete answer to the suggestion that there is an analogy between the so-called ultra vires cases and the one at bar. The fact that a corporation may perform some act which is ultra vires, presupposes that it has the capacity to perform the act in another way or under other circum-

stances. There was no way by which Whittren could purchase public lands of the United States while he was a Deputy Mineral Surveyor. His incapacity was total and unqualified. No circumstances can be conceived of under which a Deputy Mineral Surveyor could acquire by purchase the public lands. The incapacity which the law places on him finds ample justification in a wise public policy. If we complain that the law treats a Deputy Mineral Surveyor worse than an alien, let us be comforted with the thought, that the employees in the Land Office are reminded that after all public office is a public trust, demanding sacrifices as well as giving emoluments.

(5)

Since Employees in the Land Office are Disqualified from Locating Public Lands, it Cannot be Said that there is any Penalty Involved in Treating as Void any Attempted Location.

The penalty provided by Statute for attempting to locate lands is dismissal from office, and it is the only penalty. If a thief steals goods, the penalty visited upon him is imprisonment. Is it any penalty to deprive him also of the goods which he holds without title thereto? Has anyone ever contended that it is double punishment to put a thief in jail and also deprive him of the goods which the law prohibits him from taking? The Statute does not prescribe a penalty for thieving and also set forth that the title to the goods taken is void. The thief never had title of any kind or character. We realize that the analogy may not be a perfect one and we hasten to say also that in no

sense can Whittren be classed as one who has attempted to steal the public lands, but we desire to make it clear that there is no penalty involved in declaring void a title never in fact acquired. The fundamental error in the argument that a decision for respondents herein visits upon Whittren a double penalty, lies in the erroneous assumption that Whittren is deprived of something which he had. The fact is, however, that Whittren never had a claim because he could not perform the acts of location necessary to an appropriation of the public lands. To deprive him, therefore, of that which he never had is no penalty.

What a farce the law would be if such a construction were put on Section 452, *supra*, that an employee in the Land Office could use his information in acquiring choice pieces of the public lands, transfer the same to third persons, and then resign his office! If no patent were applied for the Government would not be called directly into any controversy concerning the land. Innocent purchasers might appear as grantees. The net result of the impotency of the law under the construction claimed by petitioners would be, that employees in the Land Office could secure the public lands and their titles would be untainted, provided, they paid the penalty of being removed from their positions. The Government could punish the offenders but let their acts of offense stand approved. The men who take improperly the public lands are penalized under this view of the Statute, but the lands taken are left in their possession. Such a result as this should not

be found in the interpretation of the Act, unless we are convinced that no other construction could have been intended by Congress. Where the language is plain and the strongest word possible "prohibited" is used, we submit that there should be no doubt as to the policy of the statute and that policy should not be rendered abortive by judicial construction.

Conclusion.

It has been suggested that the record herein presents a hard case, in that Whittren was deprived of his location by another locator. Petitioners have laid much emphasis on the so-called equities existing in their favor. It seems to be a matter so surprising as to excite comment when respondents suggest that the letter and the spirit of the law must be obeyed regardless of the consequences to particular litigants. Commencing with the passage of the first Act on this subject April 25, 1812, and down to the passage of Section 452, Revised Statutes, we find a clearly expressed policy set forth to the effect, that employees in the Land Office shall not directly or indirectly acquire title by purchase to the public lands. Are we called upon to defend a policy so full of the spirit of good government, or shall we break the policy down by judicial interpretation and indicate to those who administer the public lands, that spoliation is approved though the despoiler may be condemned? Shall those whose duties to the Government require them to conserve the public

lands be schooled in the belief that no act of theirs shall advantage them in any attempt whatever to gain such lands, or shall the hope of reward be held out to them, if they do the things prohibited by the plain letter of the Statute?

The Deputy Mineral Surveyor should not acquire a special advantage over all his fellow citizens, by reason of his office. There should be no special advantages to employees of the Land Office in the matter of the public lands which are open to all citizens. We must remove even the suspicion of a special advantage by placing this important question of public policy upon a sound legal foundation. Let it be known to all citizens that those who administer the public lands from the official head of the Land Office in Washington to the most insignificant office employee in a local district, shall not touch the property entrusted to them!

We most respectfully submit that at a time when the awakening moral conscience of the people against betrayals of public trust and unfaithfulness in fiduciary positions has been making such headway in suppressing frauds and protecting the equality of all citizens before the law, irrespective of official station, position, means or occupation, the established practice of the Interior Department and the rulings of Courts so far as we have hitherto gone, should not be reversed by going back to a technical and narrow construction of the Statute which will destroy forever the effectiveness of its prohibitions. We hope that the decision herein

will stand forever as a warning to all who find comfort in an interpretation of a plain Statute which robs it of all power to prevent the inhibited act.

Respectfully submitted,

ALBERT H. ELLIOT,
Attorney for Respondents.

GEORGE W. REA,
Of Counsel.



Due service and receipt of a copy of the within is hereby admitted

this _____ day of November, 1911.

Attorney for Petitioners.

223 U. S.

Syllabus.

WASKEY v. HAMMER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

No. 84. Argued December 7, 1911.—Decided January 22, 1912.

A discovery of mineral within the limits of a mining claim is essential to its validity; proximity will not suffice.

An original location is invalidated by readjusting the lines so as to exclude the point or place of the only prior discovery.

A readjusted location becomes effective as of the date of the readjustment as though it were a new one, and if the locator is disqualified at the time of the readjustment, the location is invalid.

A prohibition against purchase of public lands by officers of the Land Department and employes is to prevent abuse and inspire confidence in administration of the land laws, and should be construed broadly to include officials and employes of subordinate offices and all methods of securing title to public lands under the general laws.

A United States mineral surveyor is disqualified under § 452, Rev. Stat., from making a mining location.

Although the opinion may possibly go beyond the necessities of the case concerning the statute, if it states the natural effect to be given to a statute, and that view is accepted and acted upon for many years by the Department enforcing it, the construction should not be disturbed.

The general rule of law that an act done in violation of statutory prohibition is void and confers no right upon the wrongdoer, held applicable in this case and not subject to the qualification that it was the legislative intent that under the circumstances of the case the statute should not apply.

The fact that a statute prescribes a penalty for the doing of a prohibited act does not confine the scope of the statute to the prohibition, or make the prohibited act valid as against parties other than the Government, and so held as to § 452, Rev. Stat.

170 Fed. Rep. 31, affirmed.

THE facts, which involve the construction of the mining laws of the United States and conflicting claims thereunder, are stated in the opinion.

Mr. Albert Fink, with whom *Mr. W. H. Metson*, *Mr. Ira D. Orton* and *Mr. E. H. Ryan* were on the brief, for petitioners:

This case is a purely possessory action between two individuals and not a patent proceeding.

Notwithstanding § 2319, Rev. Stat., *Manuel v. Wulff*, 152 U. S. 505; *McKinley Mining Co. v. Alaska Mining Co.*, 183 U. S. 563, hold that no one other than the Government can question the validity of the location on ground of non-citizenship.

Location by an alien is voidable and not void and free from attack by any one except the Government. *Shea v. Nilima*, 133 Fed. Rep. 209, 215; *Tornanses v. Melsing*, 109 Fed. Rep. 711; *Lone Jack M. Co. v. Megginson*, 82 Fed. Rep. 89; *Billings v. Aspen M. & S. Co.*, 52. Fed. Rep. 250; *Holdt v. Hazard*, 102 Pac. Rep. 540. See also *Shamel on Mining Law*, 108; *Morrison's Mining Rights*, 13th ed. 308; *Lindley on Mines*, § 233; *Martin's Mining Law*, § 98; *Costigan on Mines*, § 263; *Ricketts on Mines*, § 163.

The cases arising under the National Banking Acts are analogous, and this court has uniformly held that securities taken in violation of law are enforceable by the banks, when their validity has been questioned by private persons, the same being voidable only at the instance of the Government on office found. *National Bank v. Matthews*, 98 U. S. 621, 627; *Oates v. National Bank*, 100 U. S. 239, 249; *National Bank v. Whitney*, 103 U. S. 102, 103; *Reynolds v. Bank*, 112 U. S. 405; *Schuyler National Bank v. Gadzen*, 191 U. S. 451.

In the case of contracts of foreign corporations made in violation of state statutes, no one can question their validity except the sovereign on direct proceedings instituted for that purpose. *Fritts v. Palmer*, 132 U. S. 282; *Seymour v. Slide*, 153 U. S. 523.

So as to cases arising under *ultra vires* acts of corporations. *Cowell v. Springs Co.*, 100 U. S. 55, 60; *Jones v.*

223 U. S.

Argument for Petitioners.

Habersham, 107 U. S. 174; *Blair v. City of Chicago*, 201 U. S. 450.

In cases arising under Indian Reservation Acts, where entry of one disqualified is valid on its face, no one but the Government through its land department can question the entry. *McMichael v. Murphy*, 197 U. S. 304; *Hodges v. Colcord*, 193 U. S. 192.

For analogous cases, see also *Webber v. Spokane &c.*, 64 Fed. Rep. 208; *Sanders v. Thornton*, 97 Fed. Rep. 863; *Brown v. Schlerer*, 118 Fed. Rep. 987; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. Rep. 893; *Waterbury v. McKinnon*, 146 Fed. Rep. 737-739; *Dunlap v. Mercer*, 156 Fed. Rep. 545; *Newchatel v. New York*, 49 N. E. Rep. 1043; *Ledebuhr v. Wisconsin Trust Co.*, 88 N. W. Rep. 607, 609; *Meyers v. Campbell*, 44 Atl. (N. J.) 863; *Camp v. Land*, 122 California, 167.

There are only two decisions reported on the question whether a deputy surveyor can make a mineral location, one adverse to such right, *Lavignino v. Uhlig*, 71 Pac. Rep. (Utah) 1047, and one favorable in Nevada, *Hand v. Cook*, 92 Pac. Rep. (Nevada), 3. There have, however, been other cases decided by the Land Department on this subject; as to these see 2 Lindley on Mines, 2d ed., § 661; *Seymour v. Bradford*, 37 Land Dec. 61; *Leffingwell Case*, 30 Land Dec. 139; *In re Lock Lode*, 6 Land Dec. 105; *Dennison v. Willits*, 11 Land Dec. 261; 26 Land Dec. 122, 136.

While the construction so given by a Department of the Government to any law affecting its arrangements is certainly entitled to great respect, still, however, if it is not in conformity to the true intendment, and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. *United States v. Dickson*, 15 Pet. 161, and see also *United States v. Moore*, 95 U. S. 760, 763; *Quinby v. Colon*, 104 U. S. 420, 426; *Hastings & Dak. R. R. Co. v. Whitney*, 132 U. S. 357, 366.

A deputy mineral surveyor is not either an "officer, clerk or employé" in the General Land Office. See § 10, act of April 25, 1812, establishing a General Land Office, 2 Stats. 716; act of July 4, 1836, reorganizing the General Land Office, 5 Stats. 107; §§ 2207, 2319, 2334, Rev. Stat.; act of May 16, 1872, c. 152, § 1, 17 Stat. 91; act of May 17, 1884; General Mining Circular of December 18, 1903, 31 Land Dec. 453, 489; 32 Land Dec. 367.

A deputy mineral surveyor has no duties whatever to perform outside of the surveying of the mining claims owned by private parties by whom he is employed.

A deputy mineral surveyor is not an officer within the provisions of § 452. *United States v. Hartwell*, 6 Wall. 385; *United States v. Germaine*, 99 U. S. 508; *United States v. Mouat*, 124 U. S. 303, 307; *United States v. Smith*, 124 U. S. 525, 532.

A deputy mineral surveyor is not a clerk in the General Land Office. As to definition of clerk, see Bouvier's Law Dictionary; *People v. Fire Commissioners*, 73 N. Y. 437, 442; *Satterlea v. Police Board*, 75 N. Y. 38; *People v. Fire Commissioners*, 73 N. Y. 437, 442.

A deputy mineral surveyor is not an employé in the General Land Office. As to definition of employé see Century Dictionary; Standard Dictionary; *McCluskey v. Cromwell*, 11 N. Y. 593.

A United States mineral surveyor receives no compensation from the United States of any kind or character. He is therefore not an employé of the Government. *United States v. Meiggs*, 95 U. S. 748; *Ex parte Burdell*, 32 Fed. Rep. 681; *Powell v. United States*, 60 Fed. Rep. 689, 690; *People v. Ahearn*, 110 N. Y. Supp. 306; *United States v. McDonald*, 72 Fed. Rep. 898; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 505; *Auffmordt v. Hodden*, 137 U. S. 310; see also *Vance v. Newcomb*, 124 U. S. 311; *Pack v. The Mayor &c. of New York*, 8 N. Y. 222; *Campfield v. Lane*, 25 Fed. Rep. 128; *Kelly v. The Mayor of*

223 U. S.

Opinion of the Court.

New York, 11 N. Y. 432; *Peter Morris v. Randall*, 73 N. Y. 416; *Blake v. Ferris*, 5 N. Y. 58.

By any fair interpretation of its terms, § 432 does not include United States deputy mineral surveyors. Where a statute plainly points out the persons subject to its provisions no others can by construction be brought within the purview thereof. 26 Am. & Eng. Ency. Law (2d ed.), 597; *Hamilton v. Rathbone*, 175 U. S. 4217.

Mr. Albert H. Elliot, with whom *Mr. George W. Rea* was on the brief, for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action of ejectment, the subject-matter of which was the overlapping portions of two placer mining claims in Alaska, one known as the Golden Bull and the other as the Bon Voyage. The plaintiffs claimed the area in conflict as part of the Golden Bull, and the defendants claimed it as part of the Bon Voyage. The facts, as they must be accepted for present purposes, are these:

In 1902 the Bon Voyage was located by J. Potter Whittren, he having previously made a discovery of placer gold within the ground which he included in the claim. Although not intended to be excessive, the claim embraced a trifle more than twenty acres, the maximum area permitted in a location by one person. In 1903 Whittren, upon ascertaining that fact, drew in two of the boundary lines sufficiently to exclude the excess, and in doing so left the point or place of his only prior mineral discovery outside the readjusted lines. Later in 1903, he made a discovery of placer gold within the lines as readjusted. At the time of drawing in the lines and making the subsequent discovery he was an United States mineral surveyor, but was not such at the time of the original location. In 1904 the Golden

Bull was located by B. Schwartz, and included a part of the ground embraced in the Bon Voyage. Neither claim was carried to patent or entry, and when the action was begun the defendants were in possession. The plaintiffs other than Schwartz claimed under him, and the defendants other than Whittren claimed under conveyances from him made after 1904.

Upon the trial the court, at the instance of the plaintiffs, directed a verdict in their favor, substantially upon the following grounds, taken collectively: 1. A discovery of mineral within the limits of a mining claim is essential to its validity; 2. The original location of the Bon Voyage was invalidated by the readjustment of its lines whereby the point or place of the only prior discovery of mineral was left without those lines; 3. The readjusted location was invalid because at the time of the discovery of mineral therein Whittren, being an United States mineral surveyor, was disqualified to make a location under the mining laws. The jury returned a verdict as directed, judgment was entered thereon, the judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, 170 Fed. Rep. 31, and the case is here upon certiorari. 216 U. S. 622.

Conceding that the unintentional inclusion of a trifle more than twenty acres in the Bon Voyage as originally located was an irregularity which did not vitiate the location, but merely made it necessary that the excess be excluded when it became known (*Richmond Mining Co. v. Rose*, 114 U. S. 576, 580; *McIntosh v. Price*, 121 Fed. Rep. 716; *Zimmerman v. Funchion*, 161 Fed. Rep. 859), we come to consider whether the location was invalidated when, by the readjustment of its lines, it was left without a mineral discovery therein. The mining laws, Rev. Stat. §§ 2320, 2329, make the discovery of mineral "within the limits of the claim" a prerequisite to the location of a claim, whether lode or placer, the purpose being to reward the

223 U. S.

Opinion of the Court.

discoverer and to prevent the location of land not found to be mineral. A discovery without the limits of the claim, no matter what its proximity, does not suffice. In giving effect to this restriction, this court said, in *Gwillim v. Donnellan*, 115 U. S. 45, that the loss of that part of a location which embraces the place of the only discovery therein is "a loss of the location." Possibly what was said went beyond the necessities of that case, critically considered, but it illustrates what naturally would be taken to be the effect of the statute; and as that view of it has been accepted and acted upon for twenty-five years by the Land Department and by the courts in the mining regions, it should not be disturbed now. It follows that when, in 1903, Whittren excluded from the Bon Voyage the only place at which mineral had been discovered therein, he lost the location. That his purpose was not to give up the location, but only to eliminate the excess in area, is immaterial, because, although free to exclude any other part of the claim and to retain that embracing the discovery, he excluded the latter and thereby caused the location to be without a discovery within its limits. Possibly, as was suggested in argument, the discovery was excluded because it was not deemed sufficiently promising to make its retention advisable, but, however that may have been, its exclusion defeated the location and left the lands therein "open to exploration and subject to claim for new discoveries." *Gwillim v. Donnellan*, *supra*.

As no adverse right had intervened at the time of Whittren's subsequent discovery of mineral within the limits of the readjusted location, it must be conceded that that location became effective as of that time, just as if he had then marked those limits anew (2 Lindley on Mines, §§ 328, 330), unless he was then disqualified to make a location by reason of his having become an United States mineral surveyor; and so it is necessary to consider whether such a surveyor is within the prohibition of Rev. Stat.,

§ 452, and, if so, whether that prohibition made the re-adjusted location void, or only voidable at the instance of the Government. That section reads:

"The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

Mineral surveyors are appointed by the surveyor general under Rev. Stat., § 2334, and their field of action is confined to the surveying of mining claims and to matters incident thereto. They act only at the solicitation of owners of such claims, and are paid by the owners, not by the Government; but their charges must be within the maximum fixed by the Commissioner of the General Land Office, and their work must be done in conformity to regulations prescribed by that officer. They are required to take an oath, and to execute a bond to the United States, as are many public officers. Within the limits of their authority they act in the stead of the surveyor general and under his direction, and in that sense are his deputies. The work which they do is the work of the Government, and the surveys which they make are its surveys. The right performance of their duties is of real concern, not merely to those at whose solicitation they act, but also to the owners of adjacent and conflicting claims and to the Government. Of the representatives of the Government who have to do with the proceedings incident to applications for patents to mining claims, they alone come in contact with the land itself, and have an opportunity to observe its situation and character, and the extent and nature of the work done and improvements made thereon; and it is upon their reports that the surveyor general makes the certificate required by Rev. Stat., § 2325, which is a prerequisite to the issuance of a patent. See Mining Regulations of July 26, 1901, para-

223 U. S.

Opinion of the Court.

graphs 90, 115-169, 31 Land Dec. 474, 489, 493; *Gowdy v. Kismet Gold Mining Co.*, 24 Land Dec. 191, 193. This résumé of their authority and duties, and of their relation to the surveyor general and the General Land Office, satisfies us that they are within the prohibition of § 452. That prohibition is addressed not merely to the officers of the General Land Office, or to its officers and clerks, but to its "officers, clerks and employés." These words, taken collectively, are very comprehensive and easily embrace all persons holding positions under that office and participating in the work assigned to it, as is the case with mineral surveyors. The purpose of the prohibition is to guard against the temptations and partiality likely to attend efforts to acquire public lands, or interests therein, by persons so situated, and thereby to prevent abuse and inspire confidence in the administration of the public-land laws. So understanding the letter and purpose of the prohibition, we think it embraces the location of a mining claim by a mineral surveyor. True, it is addressed to officers, clerks and employés "in the General Land Office" and is directed against "the purchase of any of the public land" by them, but in view of the terminology common to public-land legislation, we think the reference to the General Land Office is inclusive of the subordinate offices or branches maintained under its supervision, such as the offices of the surveyors-general and the local land offices, and that the term "purchase" is inclusive of the various modes of securing title to or rights in public lands under the general laws regulating their disposal.

That the construction which we here place upon § 452 is the one prevailing in the Land Department is shown in its circular of September 15, 1890, 11 Land Dec. 348, wherein it is said: "All officers, clerks and employés in the offices of the surveyors general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Com-

missioner of the General Land Office, are, during such employment, prohibited from entering or becoming interested, directly or indirectly, in any of the public lands of the United States." The published decisions of the Secretary of the Interior, although disclosing instances in which that construction has been departed from or doubted, *Dennison and Willits*, 11 Copp's Land-Owner, 261; *Lock Lode*, 6 Land Dec. 105; *W. H. Leffingwell*, 30 Land Dec. 139, show that in the main it has been closely followed. *Herbert McMicken*, 10 Land Dec. 97, and 11 Land Dec. 96; *Muller v. Coleman*, 18 Land Dec. 394; *John S. M. Neill*, 24 Land Dec. 393; *Floyd v. Montgomery*, 26 Land Dec. 122, 136; *Frank A. Maxwell*, 29 Land Dec. 76; *Alfred Baltzell*, 29 Land Dec. 333; *Seymour K. Bradford*, 36 Land Dec. 61.

In principle, the recent case of *Prosser v. Finn*, 208 U. S. 67, goes far to sustain the view here expressed. There a special agent of the General Land Office, whose field of duty was in the State of Washington, made an entry of public land under the timber-culture law, and thereafter in all respects complied with that law. But it was held by this court that he was, in every substantial sense, an employé in the General Land Office, and therefore was within the prohibition of § 452.

The general rule of law is that an act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer, but this rule is subject to the qualification that when, upon a survey of the statute, its subject-matter and the mischief sought to be prevented, it appears that the legislature intended otherwise, effect must be given to that intention. *Miller v. Ammon*, 145 U. S. 421, 426; *Burck v. Taylor*, 152 U. S. 634, 649; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 548. Here we think the general rule applies. The acts described in § 452 are expressly prohibited under penalty of dismissal. There is in its language nothing indicating that its scope is to be con-

223 U. S.

Syllabus.

fined to the exaction of that penalty, *Prosser v. Finn, supra*, or that acts done in violation of it are to be valid against all but the Government. Nor is there anything in its subject-matter or in the mischief sought to be prevented which militates against the application of the general rule. On the contrary, it is reasonably inferable, from the language of the section and the situation with which it deals, that it is intended that violations of it shall be attended by the ordinary consequences of unlawful acts. We therefore are of opinion that the readjusted location was void.

Affirmed.